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IN THE

Supreme Court of the United States

SHIRLEY EDWARDS,

Petitioner,

v.

A.H. CORNELL AND SON, INC., D/B/A AH CORNELLS; MELISSA CLOSTERMAN; SCOTT A. CORNELL,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the anti-retaliation provision of the Employee Retirement Income Security Act, 29 U.S.C. § 1140, permit an employer to discharge an employee for making unsolicited internal complaints regarding violations of the statute?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Shirley Edwards respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-30a) is reported at 610 F.3d 217. The district court's opinion (Pet. App. 31a-41a) is unpublished.

JURISDICTION

The court of appeals entered judgment on June 24, 2010. Pet. App. 1a. The court denied a timely petition for rehearing and rehearing en banc on July 26, 2010. Pet. App. 42a-43a. Justice Alito extended the time for filing the petition until November 30, 2010. No. 10A370. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Section 510 of the Employee Retirement Income Security Act, 29 U.S.C. § 1140, provides in relevant part:

> It shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to this chapter or the Welfare and Pension Plans Disclosure Act.

STATEMENT OF THE CASE

Petitioner Shirley Edwards was terminated by her employer for complaining that certain company practices violated the Employee Retirement Income Security Act (ERISA). The Third Circuit upheld the dismissal of her claim under ERISA's anti-retaliation provision, holding – in acknowledged conflict with the decisions of other circuits – that the statute does not protect unsolicited internal complaints.

1. **Statutory Framework.** ERISA is a "comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983). The statute "imposes participation, funding, and vesting requirements" on pension plans, and sets uniform standards for "reporting, disclosure, and fiduciary responsibility" for pension and other employee benefit plans. *Id.* at 91.

In passing ERISA, Congress included a detailed enforcement scheme "to preclude abuse and 'to completely secure the rights and expectations'" established by the statute. *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 137 (1990) (citation omitted). Among other things, the statute authorizes the Department of Labor to conduct investigations into possible ERISA violations and bring enforcement actions. 29 U.S.C. §§ 1132, 1134. It also allows civil actions by plan participants, beneficiaries, and fiduciaries to remedy and deter violations. 29 U.S.C. § 1132(a)(1)-(4), (a)(9).

Congress regarded ERISA's anti-retaliation provision, Section 510 of the Act, as a "crucial part" of the statute's enforcement regime. *Ingersoll-Rand*

Co., 498 U.S. at 143. The provision makes it "unlawful for any person to discharge, fine, expel, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to" ERISA. 29 U.S.C. § 1140.

2. **Factual Background.** In March 2006, respondent A.H. Cornell and Son, Inc. hired petitioner Shirley Edwards to serve as its Director of Human Resources. Pet. App. 3a. A few years later, Edwards came to believe that the company was violating ERISA by, among other things, administering its group health plan on a discriminatory basis, not offering health benefits to some employees and misrepresenting the cost of health insurance to others to dissuade them from opting into the plan. *Id.*

Petitioner complained of the ERISA violations to the company's owners and managers. In response, respondents terminated her. Pet. App. 3a.

3. **Procedural History.** Edwards brought suit in the Eastern District of Pennsylvania, alleging that respondents violated Section 510 of ERISA by terminating her in retaliation for her "inquir[ies,] objections, opposition, and/or complaints about ERISA violations" at the company. First Amended Complaint ¶ 39. Respondents moved to dismiss, asserting that Section 510 does not apply when an employee complains to a company's owners or management rather than to an external entity. Pet. App. 33a.

a. Relying on the Second Circuit's analysis in *Nicolaou v. Horizon Media, Inc.*, 402 F.3d 325 (2d Cir. 2005) (per curiam), the district court held that

Section 510 does not protect employees who raise allegations of ERISA violations within their company unless the employer solicits the information. Pet. App 40a-41a. Because Edwards had brought her complaints to respondents on her own initiative, the district court dismissed the complaint for failure to state a claim. Pet. App. 41a.

b. Edwards appealed to the Third Circuit. At the outset, the panel recognized that the courts of appeals are divided on the question "whether the anti-retaliation provision of Section 510 of ERISA, 29 U.S.C. § 1140, protects an employee's unsolicited internal complaints to management." Pet. App. 2a. "Four federal Courts of Appeals have ruled on this issue," the court observed. *Id.* "[T]he Fifth and Ninth Circuits have held in the affirmative, and the Second and Fourth Circuits have held in the negative." *Id.* In a divided decision, the panel "agree[d] with the latter, and [held] that unsolicited internal complaints are not protected." *Id.*

The majority began its analysis by recognizing that "Edwards has undoubtedly 'given information' by objecting and/or complaining to management." Pet. App. 12a. The critical question was "whether or not Edwards did so in any 'inquiry or proceeding'" relating to ERISA. *Id.* The majority held that she did not.

The court construed the term "inquiry" narrowly to include only a an externally-initiated "request for information." Pet. App. 12a. Thus, the court held, the information Edwards provided her supervisors was not part of an inquiry because she volunteered the information rather than providing it in response to a question. *Id.* The court also rejected Edwards'

assertion that her communications were themselves protected inquiries. "[A] plain reading of the provision indicates that 'inquiry' includes only inquiries made of an employee, not inquiries made by an employee." Pet. App. 13a.

The court further held that, in any event, ERISA protects only statements made in the course of a formal proceeding, like a lawsuit or agency investigation. The word "proceeding," the court observed, implies a "formal action" before a "tribunal or agency." Pet. App. 13a. And although the word "inquiry" might seem broader, the Third Circuit agreed with the Fourth that "the phrase 'testified or is about to testify' implies that the phrase 'inquiry or proceeding' is limited to more formal actions." *Id.*

The majority recognized that the Fifth and Ninth Circuits had reached the opposite conclusion. Pet. App. 7a. But in its view, the reasoning of those decisions was "not compelling." Pet. App. 14a. The Third Circuit also acknowledged that its holding conflicted with the interpretation of the Department of Labor, which construes Section 510 to protect unsolicited internal complaints. Pet. App. 12a. But the panel declined to defer to that interpretation because it found the meaning of the statutory language clear. Pet. App. 14a-15a.

For the same reason, the court refused to examine whether its holding was consistent with the statute's protective purposes. Pet. App. 14a. The majority did not dispute that under its interpretation, the statute "would permit an employer to terminate an employee upon the employee first notifying the employer of an ERISA violation." Pet. App. 14a-15a (citation omitted). But

if Congress had intended to prevent that result, the court asserted, it would have used different language. Pet. App. 15a.

c. Judge Cowen dissented. He rejected the majority's conclusion that the statutory language unambiguously precluded protection for employee-initiated internal complaints, particularly in light of the court's obligation to read the statute in light of its purposes and to avoid absurd results. Pet. App. 19a-20a. The word "inquiry," he explained, is a broad term and could be read to encompass employee complaints as the "crucial 'first step'" of many investigations. Pet. App. 22a-23a. It was "highly doubtful," he observed, "that Congress could have ever intended" to "leave[] totally unprotected" the very conduct "this remedial statutory provision was enacted to protect in the first place." Pet. App. 20a. To hold otherwise, he pointed out, required concluding that Congress "essentially permitted (and perhaps, in essence, encouraged) [an employer] to fire an employee immediately after she makes an informal complaint." Pet. App. 23a. He found this result particularly untenable as applied to certain employees who, "given their responsibility to conduct potentially sensitive and damaging investigations into possible ERISA violations and related matters, would need protection from retaliation even more than employees who merely answer[] some questions." Pet. App. 24a.

Judge Cowen further observed that the majority's rule is ultimately "unworkable." Pet. App. 23a. "[W]here does one draw the line," he asked, between an unprotected initial complaint and a protected statement "purportedly made as part of

some sort of inquiry?" *Id.* Suppose, for example, "an employee like Edwards complains to her superior, the superior asks some follow-up questions, and the employee responds to these questions." *Id.* Congress could not have intended, Judge Cowen argued, to protect those responses but not the initial complaint. *Id.*

d. Edwards filed a timely petition for rehearing en banc, which the Third Circuit denied. Pet. App. 42a-43a.

REASONS FOR GRANTING THE WRIT

As the Third Circuit acknowledged, the courts of appeals are deeply divided over whether and how ERISA's anti-retaliation provision applies in a frequently recurring circumstance: unsolicited complaints to company management. Two circuits (as well as the agency charged with ERISA's administration), construe Section 510 to cover all such complaints. Three others read the provision more narrowly, although even these circuits disagree with one another about when, if ever, statements to company management fall within the scope of the provision.

An anti-retaliation provision cannot perform its critical function in the midst of such uncertainty. Indeed, this Court has repeatedly granted certiorari to resolve similar circuit conflicts regarding the existence or scope of federal anti-retaliation protections. *See, e.g., Crawford v. Metro. Gov't of Nashville & Davidson County, Tenn.*, 129 S. Ct. 846, 850 (2009); *CBOCS W., Inc. v. Humphries*, 553 U.S. 442, 445 (2008); *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 56-57 (2006); *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 172-73

(2005); *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). It should follow the same course in this case.

I. The Decision Below Adds To A Firmly Entrenched Conflict Among The Courts Of Appeals.

The circuits are intractably divided over whether Section 510 encompasses unsolicited internal complaints regarding potential ERISA violations. The question arises and has important consequences in two contexts: suits brought directly under Section 510 and suits in which defendants attempt to remove state wrongful discharge claims to federal court on the ground that ERISA completely pre-empts the state law claim by providing an alternative federal cause of action.[1] Five courts of appeals have

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[1] Although defendants may assert pre-emption defenses in state court, they may not remove the case to federal court unless ERISA "completely pre-empts" state law by "provid[ing] the exclusive cause of action for the claim asserted." *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 8 (2003); *see also King v. Marriott Int'l*, 337 F.3d 421, 425 (4th Cir. 2003); *Rogers v. Foods, Inc.*, 308 F.3d 785, 788 (7th Cir. 2002) (collecting authorities). Thus, to decide whether state wrongful discharge claims were completely pre-empted so as to support removal to federal court, the Fourth, Fifth, and Ninth Circuits have been required to determine whether allegations in a state complaint established a claim under Section 510. *See, e.g., King*, 337 F.3d at 425; *Anderson v. Elec. Data Sys., Corp.*, 11 F.3d. 1311, 1315 (5th Cir. 1994); *Hashimoto v. Bank of Hawaii*, 999 F.2d 408, 412 (9th Cir. 1993). Because determining the scope of Section 510 was necessary to these decisions, these cases control suits within these circuits brought directly under Section 510 as well. *See, e.g., McClendon v. Hewlett-Packard, Co.*, No. CV-05-087-S-BLW, 2005 WL 1421395, at *5 (D. Idaho June 9, 2005) ("The

considered this issue in one of these two contexts: two circuits, as well as the Department of Labor, construe Section 510 to protect unsolicited internal complaints, while three other circuits do not.

1. The Ninth Circuit was the first to construe Section 510 to protect unsolicited internal complaints. *Hashimoto v. Bank of Hawaii*, 999 F.2d 408 (9th Cir. 1993). Like petitioner in this case, the plaintiff in *Hashimoto* was terminated after she brought potential ERISA violations to the attention of her supervisors and objected when directed to engage in conduct that would violate ERISA. *Id.* at 409-10. The Ninth Circuit held that the plaintiff's complaints constituted "giv[ing] information" within the protection of Section 510. *Id.* at 411. The court reasoned that "[t]he normal first step in giving information" about an ERISA violation "would be to present the problem first to the responsible managers of the ERISA plan." *Id.* If an employee is "then discharged for raising the problem, the process of giving information or testifying is interrupted at its start: the anticipatory discharge discourages the whistle blower before the whistle is blown." *Id.*

The Fifth Circuit reached the same conclusion in *Anderson v. Electronic Data Systems, Corp.*, 11 F.3d. 1311 (5th Cir. 1994). The plaintiff in that case – an employee responsible for administering pension plan

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Ninth Circuit could not have concluded that ERISA [complete] preemption applied without the determination that the former employee was qualified to assert ERISA participation protection. Thus, the pertinent *Hashimoto* language is not dictum, but controlling precedent.").

investments – was discharged after he objected to participating in ERISA violations and reported his concerns to company management. *Id.* at 1312-13. On appeal, the Fifth Circuit noted ERISA's broad prohibition on retaliation and held that the plaintiff's claim fell "squarely within the ambit of ERISA [Section] 510." *Id.* at 1314 (citations omitted).

A number of district courts in other circuits have adopted the same interpretation.[2]

So has the Department of Labor, the agency responsible for administering and enforcing Title I of ERISA.[3] *See* DOL C.A. Br. 5-6; DOL Br., *Nicolaou v. Horizon Media, Inc.*, *available at* 2004 WL 3525515. As the Department explained in its brief to the Third Circuit in this case, "[b]roadly but naturally construed, 'any inquiry or proceeding' encompasses plan participants' complaints to management or plan officials about wrongdoing, and the process by which that information is considered, however informal."

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[2] *See, e.g.*, *Dunn v. Elco Enter.*, No. 05-71801, 2006 WL 1195867, at *5 (E.D. Mich. May 4, 2006); *McSharry v. Unumprovident Corp.*, 237 F. Supp. 2d 875, 880-81 (E.D. Tenn. 2002).

[3] *See* 29 U.S.C. §§ 1132(a), 1135-36. In that role, the Secretary of Labor "may prescribe such regulations as he finds necessary or appropriate to carry out" Title I of ERISA. *Id.* § 1135. The Department also administers or enforces numerous other statutes containing anti-retaliation provisions. *See, e.g.*, 18 U.S.C. § 1514A(a)-(b) (Sarbanes-Oxley Act); 29 U.S.C. § 215(a)(3) (Fair Labor Standards Act); *id.* § 660(c) (Occupational Safety and Health Act); *id.* § 1855(a)-(b) (Migrant and Seasonal Agricultural Worker Protection Act); 33 U.S.C. § 1367(a)-(b) (Clean Water Act); 49 U.S.C. § 31105 (Surface Transportation Assistance Act).

DOL C.A. Br. 16 (citations omitted). Otherwise, "employers could readily manipulate the applicability of section 510 by postponing proceedings or disregarding complaints, and even if formal proceedings were finally instituted, the whistleblower who serves as the catalyst for the proceedings would be wholly unprotected." DOL C.A. Br. 10.

2. "Faced with the same issue, the Fourth Circuit has . . . drawn the opposite conclusion," holding that Section 510 does not protect unsolicited internal complaints. Pet. App. 8a-9a (citing *King v. Marriot Int'l, Inc.*, 337 F.3d 421, 427-28 (4th Cir. 2003)). The plaintiff in *King* was a human resources manager who was discharged after she complained about, and refused to participate in, a plan to "transfer millions of dollars from [her employer's] medical plan into its general corporate reserve account." 337 F.3d at 423. King raised her objections to her supervisor and also requested an opinion letter from one of the company's in-house attorneys. *Id.*

The Fourth Circuit held that Section 510 provided King no protection because it covers only statements made in the course of a "legal or [an] administrative," process, "or at least something more formal than written or oral complaints made to a supervisor." *Id.* at 427. The court did not dispute that the word "inquiry" can be read more broadly, but concluded that the statute's additional "use of the phrase 'testified or is about to testify' . . . suggest[s] that the phrase 'inquir[ies] or proceeding[s]'" is limited to formal proceedings. *Id.* The court likewise recognized that the phrase "given information" was broader than "testified" but construed it as referring to "non-testimonial

information," such as "incriminating documents," turned over during a formal inquiry or proceeding. *Id.* The Fourth Circuit acknowledged that it was creating a split with the Fifth and Ninth Circuits, but it regarded those courts' decisions as "unpersuasive." *Id.* at 428.

In *Nicolaou v. Horizon Media*, 402 F.3d 325 (2d Cir. 2005) (per curiam), the Second Circuit likewise held that an employee-initiated internal complaint falls outside the protection of Section 510, but adopted a different rationale. Nicolaou was an employee-fiduciary who discovered that her employer was underfunding its ERISA-covered pension plan. *Id.* at 326. Within days after she reported this violation during a face-to-face meeting with the company's outside counsel and its president, she became the subject of "a campaign of retaliation" that culminated in her discharge. *Id.* at 329.

The Second Circuit agreed with the Fourth Circuit that an unsolicited internal complaint is not part of a "proceeding" because that term "refers to the progression of a lawsuit or other business before a court, agency, or other official body." 402 F.3d at 329. But it disagreed with the Fourth Circuit's conclusion hat an "inquiry" must be a formal proceeding as well. *Id.* at 330 n.3. "Whatever level of formality is implied by the term 'proceeding' . . . the use of the somewhat less formal term 'inquiry' in ERISA is indicative of an intent to ensure protection for those involved in the informal gathering of information.'" *Id.* at 328-29 (quoting DOL Br.). Thus, the court held, "the proper focus is not on the formality or informality of the circumstances under which an individual gives information." *Id.* at 330. The "plain meaning of

'inquiry,'" the court held, extends the statute's protection to "those involved in the informal gathering of information." *Id.* at 328-29.

That insight did not, however, lead the Second Circuit to conclude that Nicolaou had stated a claim simply because she complained to her supervisors about an ERISA violation. Having construed the word "inquiry" to "refer[] broadly to any request for information," 402 F.3d at 329, the court remanded to allow Nicolaou to "demonstrate that she was contacted to meet with [management] in order to give information" about possible ERISA violations. *Id.* at 330.

In a concurring opinion, Judge Pooler explained that limiting Section 510 to complaints made in the course of a formal proceeding would run contrary to ERISA's requirement that plan fiduciaries, like Nicolaou, investigate and take action to correct plan violations upon pain of personal liability. 402 F.3d at 330-31 (citing 29 U.S.C. §§ 1104(a)(1), 1105(a)(3), 1109(a)). Moreover, in light of that duty, she believed that an "inquiry" must include not only investigations initiated by an employer or outside entity, but also inquiries conducted by fiduciaries. *Id.* at 332.

In this case, the Third Circuit "agree[d] with the Fourth Circuit's decision in *King*" that a "plain reading" of Section 510 precludes protection for unsolicited internal complaints. Pet. App. 18a-19a. Like that court, the Third Circuit decided that "the phrase 'testified or is about to testify' implies that the phrase 'inquiry or proceeding' is limited to more formal actions." Pet. App. 13a. But it also agreed with the Second Circuit that "a plain reading of the

provision indicates that 'inquiry' includes only inquiries made of an employee, not inquiries made by an employee" or other employee-initiated complaints. *Id.* Because petitioner's objections were both informal and unsolicited, it held that Section 510 did not apply to this case. *Id.*

3. This case is an ideal vehicle for restoring uniformity to the law. The scope of Section 510's protection is squarely presented by the facts of this case: petitioner would have prevailed in the Fifth or Ninth Circuit, but would have lost in the Second and Fourth Circuits, based on a disagreement among these courts regarding the meaning of Section 510. Moreover, the scope of that provision was the sole question presented on appeal and was thoroughly considered with the benefit of extensive briefing by both the parties and the Department of Labor. Pet. App. 5a.

II. This Case Presents An Important And Recurring Issue Under ERISA.

Whether ERISA's anti-retaliation provision applies to unsolicited internal complaints is an important and recurring question.

1. As the longstanding and growing circuit conflict demonstrates, the scope of Section 510's protection is frequently litigated in the lower courts.[4]

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[4] *See, e.g.*, *Nicolaou v. Horizon Media, Inc.*, 402 F.3d 325 (2d Cir. 2005); *King v. Marriott Int'l, Inc.*, 337 F.3d 421, 426-28 (4th Cir. 2003); *Anderson v. Elec. Data Sys. Corp.*, 11 F.3d 1311, 1315 (5th Cir. 1994); *Hashimoto v. Bank of Hawaii*, 999 F.2d 408, 411-12 (9th Cir. 1993); *Momchilov v. McIlvaine Trucking*

That is hardly surprising given that the statute applies to pension and benefit plans that cover over 150 million people.[5] Eighty-six million actively participate in ERISA pension plans[6] and almost seventy percent of Americans who have health insurance receive it through an ERISA-governed plan.[7]

ERISA's protections thus remain vital to the effective provision of American retirement security and medical benefits. And the Act's anti-retaliation provision is essential to the statute's effectiveness, helping "to make [ERISA's] promises credible" by protecting the individuals who are often best situated

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Int'l, Inc., No. 5:09CV1322, 2010 WL 1254216 (Mar. 24, 2010 N.D. Ohio); *Ello v. Singh*, 531 F. Supp. 2d 552, 573 (S.D.N.Y. 2007); *Simons v. Midwest Tel. Sales & Serv. Inc.*, 462 F. Supp. 2d 1004, 1008 (D. Minn. 2006); *Dunn v. Elco Enter.*, No. 05-711, 2006 WL 1195867 (May 4, 2006 E.D. Mich.); *McSharry v. Unumprovident Corp.*, 237 F. Supp. 2d 875, 878-79 (E.D. Tenn. 2002); *Klein v. Banknorth Group, Inc.*, 977 F. Supp. 302, 304-305 (D. Vt. 1997); *Jorgensen v. Prudential Ins. Co. of Am.*, 852 F. Supp. 255, 262-63 (D.N.J. 1994); *McLean v. Carlson Cos., Inc.*, 777 F. Supp. 1480, 1483-84 (D. Minn. 1991).

[5] Department of Labor, Description of Employee Benefits Security Administration, *available at* http://www.dol.gov/ebsa/OEManual/main.html; *see also* 29 U.S.C. § 1001(a) (finding that ERISA plans directly affect "the continued well-being and security of millions of employees and their dependents").

[6] Department of Labor, Employee Benefits Security Administration, Private Pension Plan Bulletin, p. 3, June 2010, *available at* http://www.dol.gov/ebsa/PDF/2007pensionplan bulletin.PDF.

[7] *See* Report of the Congressional Budget Office 7, Table 2 (Mar. 18, 2010), *available at* http://www.cbo.gov/ftpdocs/113xx/doc11355/hr4872.pdf.

to identify and bring to light violations that can threaten the rights of thousands of workers and even the viability of an employer's benefit plan. *See Inter-Modal Rail Employees Ass'n v. Atchison, Topeka, Santa Fe Ry. Co.*, 520 U.S. 510, 515 (1997); *see also Ingersoll-Rand Co v. McClendon*, 498 U.S. 133, 143 (1990).

2. The inconsistent application of this critical component of ERISA's enforcement regime is untenable. Congress intended ERISA to replace a "patchwork scheme of regulation" by the states. *FMC Corp. v. Holliday*, 498 U.S. 52, 60 (1990) (citation omitted). Yet at present, employees are protected against retaliation for any unsolicited internal complaint in twelve states. In eight states, Section 510 applies only if the employee raises objections in a formal proceeding, such as a complaint to the Department of Labor or a lawsuit. And in two others, workers must show that they responded to an employer's questions and are not protected if they initiate an inquiry themselves.

Employees need to know whether they can safely bring their concerns to the attention of the company or, instead, must file a formal complaint with the Department of Labor or initiate litigation in order to secure legal protection against retaliation. The question is particularly important to plan fiduciaries, who have an obligation under ERISA to take action to correct any violation they discover. *See* 29 U.S.C. § 1109.

At the same time, varying interpretations of ERISA subject employers – particularly those operating national or regional employee benefit plans – to inconsistent rules, in conflict with Congress's intent to establish "a uniform regulatory regime over

employee benefit plans." *Aetna Health Inc. v. Davila*, 542 U.S. 200, 208 (2004).

Congress plainly did not intend to provide employees of the same firm dramatically different protection depending on whether they worked in the company's office in Los Angeles, New York, or Philadelphia. Nor did Congress intend to subject employers to varying standards of liability depending on the circuit in which they are sued. Yet, the existing division may encourage forum shopping to achieve precisely that result under ERISA's permissive venue provision. 29 U.S.C. § 1132(e)(2) (permitting plaintiffs to file suit "in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found").

III. ERISA's Anti-Retaliation Provision Protects Unsolicited Internal Reports Of Possible ERISA Violations.

Certiorari is also warranted because the decision below conflicts with the text and manifest purposes of ERISA. "[E]ffective enforcement" of a statute like ERISA can "only be expected if employees fe[el] free to approach officials with their grievances." *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67 (2006) (citation omitted). Accordingly, this Court has interpreted the text of analogous anti-retaliation provisions consistent with Congress's intent to ensure that employees are "completely free from coercion against reporting" unlawful practices. *NLRB v. Scrivener*, 405 U.S. 117, 121 (1972) (citation omitted). In this case, the Third Circuit made no pretense that its interpretation could be reconciled with these principles. It held instead that the plain

text of Section 510 required it to construe the provision in a manner that is ineffective to prevent even the most egregious employer retaliation. But that conclusion was wrong. In fact, the language easily permits, and the statutes' purposes demand, protection for all employees who make complaints regarding ERISA violations to their employers.

A. Nothing In The Text Of Section 510 Precludes Protection For Unsolicited Internal Complaints.

The language of Section 510 is broad and encompassing. The statute protects not only employees who "testify" in ERISA "proceedings," but also those who "give[] information" in "any inquiry" relating to an ERISA violation. 29 U.S.C. § 1140. The terms "information" and "inquiry" are expansive. An individual can "giv[e] information" through any number of methods – from having a face-to-face discussion to submitting formal complaint documents. The term "inquiry" is similarly sweeping. Accordingly, while an "inquiry" would certainly encompass formal proceedings or employer-initiated investigations, ordinary usage does not cabin the term to such a narrow meaning.

1. An "Inquiry" Encompasses An Internal Complaint.

The Third and Fourth Circuits have nonetheless construed the term "inquiry" as limited to "formal actions." Pet. App. 13a; *King*, 337 F.3d at 427. These courts assert that the phrase "inquiry or proceeding" must be interpreted in light of its proximity to the phrase "testified or is about to testify," which "connote[s] a formality that does not attend" to

"intra-company complaints." *King*, 337 F.3d at 427; *see also* Pet. App. 13a.

As the Second Circuit rightly observed, precisely the opposite inference arises from Congress's inclusion of the broad and colloquial words "information" and "inquiry," in addition to the more specific terms "proceeding" and "testimony." *Nicolaou*, 402 F.3d at 330 n.3. A statute must be read to "give the nouns their separate, normal meanings." *Garcia v. United States*, 469 U.S. 70, 73 (1984) (citation omitted). And in this case, "proceeding" – the narrower term – by itself encompasses a formal legal and administrative process. Lest it be rendered surplusage, the word "inquiry" must refer to something else.

Nor does the word "inquiry" naturally connote formality. Quite to the contrary, "the plain meaning of 'inquiry'" extends to an "informal gathering of information" as well as to more formal proceedings. *Nicolaou*, 402 F.3d at 328-29. *See, e.g.*, MERRIAM WEBSTER'S COLLEGIATE DICTIONARY at 646 (11th ed. 2001) (defining "inquiry" as an "examination into facts or principles"); *cf. also Varity Corp. v. Howe*, 516 U.S. 489, 506 (1996) (referring to informal "employee inquiries" to plan fiduciaries); *Electro-Mech. Corp. v. Ogan*, 9 F.3d 445, 451 (6th Cir. 1993) ("ERISA imposes a duty upon fiduciaries to respond promptly and adequately to *employee-initiated inquiries* regarding the plan or any of its terms.") (emphasis added).

2. An "Inquiry" Includes An Employee-Initiated Communication.

Even setting aside formality, the Third Circuit also held that an "inquiry" must be initiated by

someone other than the employee herself, thereby excluding from protection unsolicited complaints. Pet. App. 13a. But that conclusion finds no support in the text of Section 510. Furthermore, it would lead to difficult line-drawing and absurd results Congress could not have intended.

By its terms, Section 510 applies to "*any* inquiry" related to a possible ERISA violation. 29 U.S.C. § 1140 (emphasis added). As this Court has explained, the modifier "any" "excludes selection or distinction." *Citizens' Bank v. Parker*, 192 U.S. 73, 81 (1904). When Congress uses the word "any" it "declares the [statutory phrase it modifies] without limitation." *Id.*; *see also City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 739 (1995) (Thomas, J., dissenting) (finding it "difficult to imagine what broader terms Congress could have used" than the term "any"). By inserting "any" before the term "inquiry," Congress thus confirmed that Section 510 would protect the full range of potential inquiries relating to ERISA.

This includes cases in which an employee conveys information in the course of conducting her own inquiry into possible ERISA violations. As in this case, it is not uncommon that employees with plan-related responsibilities may come to suspect that the plan is not being operated in accordance with ERISA's mandates. Indeed, employee-fiduciaries have a statutory obligation to monitor plan compliance, investigate possible violations, and take remedial action. 29 U.S.C. §§ 1104(a)(1), 1105(a)(3), 1109(a). When they fulfill those responsibilities by alerting their employer of questionable practices in the course of attempting to determine the plan's compliance with the law, they

have "given information . . . in an[] inquiry . . . relating to" ERISA, within any reasonable construction of those words. 29 U.S.C. § 1140.

The statute's language likewise encompasses employee complaints that could cause the employer to initiate an inquiry. In *NLRB v. Scrivener*, 405 U.S. 117 (1972), this Court considered a similar question under the National Labor Relations Act (NLRA). The NLRA prohibits retaliation against an employee because he has "filed charges or given testimony under this Act." 29 U.S.C. § 158. In *Scrivener*, a union filed a charge with the National Labor Relations Board, which sent an investigator to take statements from several employees, whom the employer then promptly fired.

Although the terminated employees had not filed any charges, and although they had not yet given any testimony, this Court held that the statute protected their conduct. 405 U.S. at 121-25. "The Act's reference . . . to an employee who 'has filed charges or given testimony[]' could be read strictly and confined in its reach to formal charges and formal testimony," the Court acknowledged. *Id.* at 122. But "[i]t can also be read more broadly." *Id.* "[T]extual analysis alone" revealed "an intent on the part of Congress to afford broad rather than narrow protection to the employee," consistent with the statute's "purpose and objective." *Id.* Accordingly, the Court rejected the court of appeals' conclusion that the word "testimony" did not encompass "preliminary preparations for giving testimony," such as providing information to an investigator. *Id.* at 121.

So, too, ERISA's protection for those who "give information in any inquiry" can and should be construed to extend to the entirety of the inquiry

process, including essential preliminary steps such as providing information regarding the need for an investigation.

c. The court of appeals' contrary narrow construction of "inquiry" leads to absurd results Congress could not have intended.

For one thing, the decision below calls into question whether complaints to the Department of Labor are protected. If "a plain reading" of the word "inquiry" necessarily "includes *only* inquiries made *of* an employee," as the Third Circuit held, Pet. App. 13a (emphasis added), it does not encompass an employee's unsolicited complaint to an outside agency, even one charged with enforcing the statute.

But even assuming the court of appeals would somehow find a way to protect complaints to the Government but not to an employer, many anomalies would nonetheless remain. The protection that ERISA affords cannot sensibly turn on whether an employee provides information in response to a question or on her own initiative. *Cf. Crawford v. Metro. Gov't of Nashville & Davidson County, Tenn.*, 129 S. Ct. 846, 851 (2009) (describing as "freakish" a rule "protecting an employee who reports discrimination on her own initiative but not one who reports the same discrimination in the same words when her boss asks a question"). Nor could Congress have intended the statute's protections to depend on whether a supervisor responds to a complaint with a follow-up question or instead fires the complainant on the spot.

Moreover, the arbitrary distinctions the Third Circuit's decision draws would be entirely too difficult to administer in practice. Congress would not have contemplated that juries would spend their time

deciding whether a worker was fired for her initial complaint or for answering a follow-up question; or whether a supervisor (lawfully) fired the employee for lodging an initial complaint with the company, or instead (unlawfully) terminated her for repeating her complaint to the Government.[8]

B. The Third Circuit's Rule Contravenes The Purpose Of ERISA's Anti-Retaliation Provision.

In fact, limiting the protections of Section 510 to solicited or external complaints would frustrate the basic purposes of ERISA's anti-retaliation provision by providing perverse incentives for both employers and employees.

By excluding protection for unsolicited complaints, the majority's rule in this case would "permit[] (and perhaps, in essence, encourage[])" supervisors to "fire an employee immediately after she makes an informal complaint instead of conducting an investigation." Pet. App. 23a (Cowen, J., dissenting). This may be particularly true when the supervisor receiving the complaint, and terminating the employee, is responsible for the

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[8] To the extent the Court finds the text ambiguous, it should defer to the Department of Labor's interpretation. The Department – which has primary enforcement and regulatory authority under Title I of ERISA, *see* 29 U.S.C. §§ 1132, 1135-36 – has construed Section 510 to protect employee-initiated internal complaints. *See* DOL C.A. Br. 5-6; DOL Br., *Nicolaou v. Horizon Media, Inc.*, 2004 WL 3525515. That consistent position warrants deference. *See generally United States v. Mead Corp.*, 533 U.S. 218 (2001); *see also id.* at 256-57 (Scalia, J., dissenting).

violation and risks termination himself if the violation comes to light.

Employees like petitioner are often a company's best resource for preventing and remedying breaches of ERISA because they have direct knowledge of the company's practices. The decision here, however, may often prevent a company's upper management or owners from learning of problems at an early stage when they may be more readily and inexpensively remedied. That frustrates the statute's general intent to prevent violations and encourage voluntary compliance. *See* H.R. Rep. No. 93-533, at 17 (1974).

Moreover, by construing Section 510 to protect only complaints made outside the company, the decision below encourages workers to file complaints with the Department of Labor or to proceed directly to court. But complaining to the Department of Labor can be ineffective, as the Department of Labor "simply does not have the resources to monitor all alleged ERISA violations." DOL C.A. Br. 22. Moreover, even when undertaken, a Department of Labor investigation imposes significant expense on employers, creates friction within the workplace, and can often delay resolution of ERISA disputes that could be been resolved internally. In these respects, private lawsuits are even worse, imposing great expense and delay to resolve ERISA disputes that often could have been easily resolved through a simple conversation with the employer.

Worse yet, the decision below inevitably will discourage many employees from reporting ERISA violations at all, to the detriment of plan participants

and their families and, ultimately, the larger community.[9]

* * * * *

Stripped of any pretense that its narrow construction of ERISA's anti-retaliation provision is the only one permitted by the text of the statute, the Third Circuit's interpretation of Section 510 quickly collapses under the weight of common sense and congressional purpose. This Court should not permit that error to continue to propagate among the circuits.

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[9] Left undiscovered, serious ERISA violations can jeopardize the very solvency of pension and benefit plans, imposing significant costs on other plans through increased insurance premiums to the Pension Benefits Guaranty Corporation (PBGC), the federal agency that insures ERISA defined-benefit pensions. And while the PBGC typically relies on insurance-premium revenue and not tax revenues to guarantee underfunded pensions, PBGC recognizes some potential for a taxpayer-funded bailout. *See* Understanding the Financial Condition of the Pension Insurance Program, *available at* http://www.pbgc.gov/media/key-resources-for-the-press/content/page15247.html.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 30, 2010

APPENDIX

APPENDIX A

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 09-3198

SHIRLEY EDWARDS, Appellant

v.

A.H. CORNELL AND SON, INC., D/B/A AH CORNELLS; MELISSA CLOSTERMAN; SCOTT A. CORNELL

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(District Court No. 09-cv-1184)
District Judge: The Honorable J. Curtis Joyner

Argued April 13, 2010

Before: FISHER, HARDIMAN, and COWEN, *Circuit Judges*

(Filed: June 24, 2010)

Justin L. Swidler (Argued)
Bensalem, PA
Counsel for Appellant

Walter H. Flamm, Jr. (Argued)
Blue Bell, PA
Counsel for Appellees

Eric C. Lund (Argued)
Washington, D.C.
Counsel for Amicus Curiae, Secretary of Labor

OPINION OF THE COURT

FISHER, Circuit Judge.

Shirley Edwards filed suit against her employer, A.H. Cornell and Son, Inc. ("A.H. Cornell"), and supervisors, Scott A. Cornell and Melissa J. Closterman, claiming that she was terminated in violation of Section 510 of the Employee Retirement Income Security Act of 1974 ("ERISA") and state common law after complaining to management about alleged ERISA violations. The defendants filed a Rule 12(b)(6) motion to dismiss, and the District Court granted the motion, holding that Edwards's complaints were not part of an "inquiry or proceeding" and thus not protected under Section 510. On appeal, we are presented with a single issue of first impression for this Court: whether the anti-retaliation provision of Section 510 of ERISA, 29 U.S.C. § 1140, protects an employee's unsolicited internal complaints to management. Four federal Courts of Appeals have ruled on this issue: the Fifth and Ninth Circuits have held in the affirmative, and the Second and Fourth Circuits have held in the negative. We agree with the latter, and hold that unsolicited internal complaints are not protected.

I.

A.[1]

Defendant A.H. Cornell is a family-owned company that provides commercial and residential

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[1] Because Edwards appeals from a Federal Rule of Civil Procedure 12(b)(6) motion to dismiss, the facts pled by Edwards in her complaint are assumed to be true. *See Fowler v. UPMC Shadyside*, 578 F.3d 203, 210 (3d Cir. 2009).

construction services. In March 2006, A.H. Cornell hired Plaintiff Edwards to serve as its Director of Human Resources and to establish a human resources department. Defendant Cornell, an A.H. Cornell executive, oversaw the terms and conditions of Edwards's employment, and Defendant Closterman, who managed the company's daily operations, acted as Edwards's supervisor. Edwards was employed by A.H. Cornell for a total of nearly three years. As an employee, Edwards participated in the company's group health insurance plan, which was governed by ERISA.

Edwards claims that she discovered, during the last weeks of her employment, that A.H. Cornell was engaged in several ERISA violations: the company was allegedly administering the group health plan on a discriminatory basis, misrepresenting to some employees the cost of group health coverage in an effort to dissuade employees from opting into benefits, and enrolling non-citizens in its ERISA plans by providing false social security numbers and other fraudulent information to insurance carriers. Edwards alleges that she "objected to and/or complained to" A.H. Cornell's management about these ERISA violations and was terminated on or around February 11, 2009, as a result. (App. at 26, ¶ 33.) According to Edwards, Closterman was directly responsible for her termination, and Cornell participated.

B.

On March 18, 2009, Edwards filed a complaint in the United States District Court for the Eastern District of Pennsylvania against A.H. Cornell, Cornell,

and Closterman, asserting an anti-retaliation claim under Section 510 of ERISA and common law wrongful discharge. On May 18, 2009, the defendants filed a motion to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6), arguing that Edwards had not engaged in a protected activity under Section 510.

The District Court granted the motion to dismiss on July 23, 2009. After examining the circuit split on this issue, the District Court determined that the Second Circuit's analysis in *Nicolaou v. Horizon Media, Inc.*, 402 F.3d 325 (2d Cir. 2005) (per curiam), was persuasive and held that Edwards failed to state a claim upon which relief could be granted because her alleged objections and/or complaints to management were not part of an "inquiry or proceeding":

> "Plaintiff does not allege that anyone requested information from her or initiated contact with her in any way regarding the alleged ERISA violations. Nor does she allege that she was involved in any type of formal or informal gathering of information. She states merely that she objected to or complained about certain conduct by Defendants."

(App. at 13-14 (citations omitted).) Having dismissed Edwards's ERISA claim, the District Court declined to exercise supplemental jurisdiction over Edwards's state law claim for wrongful discharge.

Edwards timely appealed, and the Secretary of Labor filed a brief as amicus curiae in support of Edwards's position.

II.

The District Court had jurisdiction under 28 U.S.C. § 1331, and we have jurisdiction pursuant to 28 U.S.C. § 1291. "We review de novo the District Court's dismissal of an action under Rule 12(b)(6)." *Nationwide Life Ins. Co. v. Commonwealth Land Title Ins. Co.*, 579 F.3d 304, 307 (3d Cir. 2009) (emphasis omitted). Pursuant to *Ashcroft v. Iqbal*, --- U.S. ----, 129 S. Ct. 1937, 173 L.Ed.2d 868 (2009), district courts must conduct a two-part analysis when presented with a motion to dismiss. *Fowler v. UPMC Shadyside,* 578 F.3d 203, 210 (3d Cir. 2009). "First, the factual and legal elements of a claim should be separated." *Id.* "The District Court must accept all of the complaint's well-pleaded facts as true, but may disregard any legal conclusions." *Id.* at 210-11. "Second, a District Court must then determine whether the facts alleged in the complaint are sufficient to show that the plaintiff has a 'plausible claim for relief.'" *Id.* at 211 (quoting *Iqbal,* 129 S. Ct. at 1950).

III.

The sole issue on appeal is whether the District Court erred in holding that unsolicited internal complaints are not protected activities under the anti-retaliation provision of Section 510 of ERISA, 29 U.S.C. § 1140.[2] We will affirm.

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[2] Edwards also contends, citing a single district court opinion, that she is protected under a separate clause of Section 510, which provides,

> "It shall be unlawful for any person to discharge ... a participant or beneficiary for exercising any right to

A. Background

"ERISA is a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90, 103 S. Ct. 2890, 77 L.Ed.2d 490 (1983). "The statute imposes participation, funding, and vesting requirements on pension plans. It also sets various uniform standards, including rules concerning reporting, disclosure, and fiduciary responsibility, for both pension and welfare plans." *Id.* at 91, 103 S. Ct. 2890. As part of this system, "Congress included various safeguards to preclude abuse and 'to completely secure the rights and expectations brought into being by this landmark reform legislation.'" *Ingersoll-Rand Co. v. McClendon,* 498 U.S. 133, 137, 111 S. Ct. 478, 112 L.Ed.2d 474 (1990) (quoting S. Rep. No. 93-127, at 36 (1973), 1974 U.S.C.C.A.N. 4838). One such safeguard is ERISA's anti-retaliation or "whistleblower" provision, which provides as follows:

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which he is entitled under the provisions of an employee benefit plan, [or] this subchapter, ... or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, [or] this subchapter[.]"

29 U.S.C. § 1140. (*See also* Edwards Br. at 15-16.) Since Edwards failed to raise this argument in the District Court, it is waived. *See DIRECTV Inc. v. Seijas*, 508 F.3d 123, 125 n. 1 (3d Cir. 2007) ("It is well established that arguments not raised before the District Court are waived on appeal.").

> "It shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to this chapter or the Welfare and Pension Plans Disclosure Act."

29 U.S.C. § 1140. Put simply, the purpose of the provision is to "proscribe[ ] interference with rights protected by ERISA." *Ingersoll-Rand Co.*, 498 U.S. at 137, 111 S. Ct. 478.

B. The Circuit Split

The federal Courts of Appeals are split on whether Section 510 encompasses unsolicited internal complaints. The Fifth and Ninth Circuits have held in the affirmative, *see Anderson v. Elec. Data Sys. Corp.*, 11 F.3d 1311 (5th Cir. 1994), and *Hashimoto v. Bank of Hawaii*, 999 F.2d 408 (9th Cir. 1993), while the Second and Fourth Circuits have held in the negative, *see Nicolaou*, 402 F.3d 325, and *King v. Marriott Int'l Inc.*, 337 F.3d 421 (4th Cir. 2003).

The Ninth and Fifth Circuits were the first circuits to consider the issue. In each case, the plaintiff employee filed a complaint under state law alleging wrongful discharge for complaining to supervisors about alleged ERISA violations.[3] *Hashimoto*, 999 F.2d at 409-10; *Anderson*, 11 F.3d at 1312-13. Finding that Section 510 of ERISA already provided employees with

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[3] The employee in *Anderson* also claimed that he was discharged for refusing to commit acts in violation of ERISA. 11 F.3d at 1312-13.

a remedy, the Ninth Circuit held that the employee's state law claim was completely preempted by ERISA and remanded the case to allow the state claim to be re-characterized as a federal cause of action. *Hashimoto*, 999 F.2d at 411-12. The court explained that the failure of Section 510 to protect internal complaints would, in practice, inhibit the effectiveness of the anti-retaliation provision:

> "The normal first step in giving information or testifying in any way that might tempt an employer to discharge one would be to present the problem first to the responsible managers of the ERISA plan. If one is then discharged for raising the problem, the process of giving information or testifying is interrupted at its start: the anticipatory discharge discourages the whistle blower before the whistle is blown."

Id. at 411. Shortly thereafter, the Fifth Circuit arrived at the same conclusion in *Anderson*, holding that a state law claim for wrongful discharge was preempted by ERISA in part "because the cause of action would conflict with the enforcement provisions of §§ 502(a) and 510 of ERISA." 11 F.3d at 1314. The court further explained, in broad terms, "[the employee's] claim falls squarely within the ambit of ERISA § 510[,]" which "addresses discharges for exercising ERISA rights or for the purpose of interfering with the attainment of ERISA rights, as well as discharges for providing information or testimony relating to ERISA." *Id.* (quotations and citations omitted).

Faced with the same issue, the Fourth Circuit has since drawn the opposite conclusion, holding that an employee's state law wrongful discharge claim is not

preempted by ERISA because Section 510 does not protect unsolicited internal complaints. *King*, 337 F.3d at 427-28. Focusing on "the proper scope of the phrase 'inquiry or proceeding,'" the court analogized Section 510 to the anti-retaliation provision in the Fair Labor Standards Act (FLSA)[4]:

> "In the instant case, as well, the use of the phrase 'testified or is about to testify' does suggest that the phrase 'inquir[ies] or proceeding[s]' referenced in section 510 is limited to the legal or administrative, or at least to something more formal than written or oral complaints made to a supervisor. The phrase 'given information' does no more than insure that even the provision of non-testimonial information (such as incriminating documents) in an inquiry or proceeding would be covered. And, here as well [ ], the anti-retaliation provision in section 510 is much narrower than the equivalent [in Title VII.][5]"

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[4] Section 15(a)(3) of the FLSA provides that it is unlawful for any person

> "to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee[.]"

29 U.S.C. § 215(a)(3). In *Ball v. Memphis Bar-B-Q Co., Inc.*, 228 F.3d 360 (4th Cir. 2000), the Fourth Circuit held that Section 15(a)(3) does not protect internal complaints. *Id.* at 364. This is the minority view. *See* note 8, *infra*.

[5] Section 704(a) of Title VII provides,

Id. at 427 (first and second alterations in original; footnote 5 supplied). The Fourth Circuit found that the Ninth and Fifth Circuit decisions in *Hashimoto* and *Anderson*, respectively, were not persuasive. According to the court, the Ninth Circuit in *Hashimoto* improperly "reject[ed] the most compelling interpretation of the statutory language for a 'fair' interpretation," and the Fifth Circuit in *Anderson* "merely recited section 510 without even addressing the facial inapplicability of section 510 to intra-office complaints." *Id.* at 428.

The sole federal Court of Appeals to address this issue in the context that we are presented with here – where an employee actually brings suit under Section 510 of ERISA itself – is the Second Circuit in *Nicolaou*. 402 F.3d at 327. Unlike the Fourth Circuit in *King*, the Second Circuit found that Section 510 of ERISA is "unambiguously broader in scope" than its counterpart in the FLSA. *Id.* at 328. Nevertheless, the court held that unsolicited internal complaints are not protected activities. First, the court explained that internal complaints could not fall under the term "proceeding" because "proceeding" "refers to the progression of a lawsuit or other business before a court, agency, or other official body[.]" *Id.* at 329. Second, the court held that, for an internal complaint to constitute an

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"It shall be an unlawful employment practice for an employer to discriminate against any of his employees ... because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter."
42 U.S.C. § 2000e-3(a).

"inquiry," the employee would need to "demonstrate that she was contacted to meet with [management] in order to give information about the alleged [ERISA violation.]" *Id.* In other words, the employee's complaint would need to have been solicited.[6]

C. The Plain Meaning of Section 510

We begin our analysis of ERISA's anti-retaliation provision "with an examination of ERISA's statutory language because 'absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.'" *Wolk v. Unum Life Ins. of Am.*, 186 F.3d 352, 355 (3d Cir. 1999) (quoting *Kaiser Aluminum & Chem. Corp. v. Bonjorno,* 494 U.S. 827, 835, 110 S. Ct. 1570, 108 L.Ed.2d 842 (1990)) (other quotations and citations omitted). Therefore, "the first step is to determine whether [Section 510] has a plain and unambiguous meaning." *Dobrek v. Phelan*, 419 F.3d 259, 263 (3d Cir. 2005). Words or provisions are ambiguous when "'they are reasonably susceptible of different interpretations.'" *Id.* at 264 (quoting *Nat'l R.R. Passenger Corp. v. Atchison Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 473 n. 27, 105 S. Ct. 1441, 84 L.Ed.2d 432 (1985)). If there is an ambiguity, we look to "the surrounding words and provisions and also to the words in context." *Id.*

To reiterate, Section 510 of ERISA provides as follows:

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[6] Although its analysis was more nuanced with regard to the term "inquiry," the *Nicolaou* court did not view its holding to be in conflict with the Fourth Circuit's decision in *King*. *See Nicolaou*, 402 F.3d at 330.

> "It shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to this chapter or the Welfare and Pension Plans Disclosure Act."

29 U.S.C. § 1140. Since Edwards has undoubtedly "given information" by objecting and/or complaining to management, at issue in this appeal is whether or not Edwards did so in any "inquiry or proceeding." The Secretary of Labor argues, in its brief as amicus curiae, that "[b]roadly but naturally construed, 'any inquiry or proceeding' encompasses plan participants' complaints to management or plan officials about wrongdoing, and the process by which that information is considered, however informal." (Secretary Br. at 16.) We disagree.

An "inquiry" is generally defined as "[a] request for information." Black's Law Dictionary 864 (9th ed.2009). Here, Edwards does not allege that anyone approached her requesting information regarding a potential ERISA violation. Rather, she made her complaint voluntarily, of her own accord. Under these circumstances, the information that Edwards relayed to management was not part of an inquiry under the term's plain meaning.

On appeal, Edwards argues that her objections and/or complaints were themselves the inquiry. We disagree. Edwards's complaints were statements regarding potential ERISA violations, not questions seeking information. Furthermore, because § 1140 protects employees that have "given information," not

employees that have "received information," a plain reading of the provision indicates that "inquiry" includes only inquiries made of an employee, not inquiries made by an employee. The fact that Edwards's complaints may have eventually "culminat[ed]" in an inquiry, (*see* Secretary Br. at 17), underscores the fact that the complaints themselves, without more, do not constitute an inquiry.

Neither is Edwards's conduct encompassed by the term "proceeding." A "proceeding" is commonly defined as "[t]he regular and orderly progression of a lawsuit" or the "procedural means for seeking redress from a tribunal or agency." Black's Law Dictionary 1324 (9th ed. 2009). Here, there is no suggestion that any such formal action has occurred.[7]

In so holding, we follow the Fourth Circuit's opinion in *King*. As the *King* court noted, even beyond the plain meaning of "inquiry" and "proceeding," the phrase "testified or is about to testify" implies that the phrase "inquiry or proceeding" is limited to more formal actions. *See King*, 337 F.3d at 427. Not all anti-retaliation statutes are so limited. In drafting § 1140, Congress could have used broad language similar to that present in the anti-retaliation provision in Section 704(a) of Title VII, which extends broad protection to employees that have "opposed any practice made an unlawful employment practice by [Title VII.]" 42

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[7] As it is not necessary for the disposition of this case, we decline to elaborate on the level of formality required for protection under Section 510. At the very least, the provision would protect information given in legal and administrative proceedings.

U.S.C. § 2000e-3(a). Congress declined to do so, and, like the court in *King*, we find this choice to be persuasive. *See King*, 337 F.3d at 427. Finally, we agree with the Fourth Circuit that the Ninth and Fifth Circuit opinions in *Hashimoto* and *Anderson*, respectively, are not compelling. Neither court examined the statutory language of Section 510 in detail: the Fifth Circuit gave the issue cursory treatment, *see Anderson*, 11 F.3d at 1314, and the Ninth Circuit appeared to focus its analysis on the adoption of a "fair" interpretation, *see Hashimoto*, 999 F.2d at 411. *See also King*, 337 F.3d at 428.

Edwards and the Secretary argue that we should give Section 510 a broader reading because ERISA is a remedial statute. This connection is lacking. Although ERISA "should be liberally construed in favor of protecting the participants in employee benefit plans," *see IUE AFL-CIO Pension Fund v. Barker & Williamson, Inc.*, 788 F.2d 118, 127 (3d Cir. 1986), this does not entitle us to ignore clear statutory language. *See Wolk*, 186 F.3d at 355 ("[A]bsent a clearly expressed legislative intention to the contrary, [ERISA's statutory] language must ordinarily be regarded as conclusive." (quotations and citations omitted)). If Section 510 were ambiguous, we would construe the provision in favor of plan participants. However, as discussed above, we find the provision's plain meaning to be clear.

Likewise, Edwards and the Secretary argue that Section 510 deserves a broader reading because the failure to protect unsolicited internal complaints would undermine the provision's purpose, as "it would permit an employer to terminate an employee upon

the employee first notifying the employer of the ERISA violation[.]" (Edwards Br. at 14.) This contention must also fail. Presented as we are with clear statuary language, we do not need to speculate as to Congress's intent. It suffices to note that, had Congress been concerned with such a scenario, Congress could have used broad language mirroring the anti-retaliation provision of Title VII. Congress chose not to do so.

D. Analogous Third Circuit Precedent

Contrary to the assertions of Edwards and the Secretary, the conclusion that Section 510 of ERISA does not protect unsolicited internal complaints does not conflict with our prior case law regarding anti-retaliation statutes. Edwards and the Secretary cite two opinions to that effect: *Brock v. Richardson*, 812 F.2d 121 (3d Cir. 1987), which addresses the scope of Section 15(a)(3) of the FLSA, and *Passaic Valley Sewerage Commissioners v. United States Department of Labor*, 992 F.2d 474 (3d Cir. 1993), which addresses the scope of Section 507(a) of the Clean Water Act (CWA). Neither case is controlling here.

Brock is distinguishable because it concerned a different issue in the context of a different statute. We examined in *Brock* whether "an employer's [mistaken] belief that an employee has engaged in protected activity is sufficient to trigger application" of the anti-retaliation provision of the FLSA, and held in the affirmative. 812 F.2d at 123. We did not address whether Section 15(a)(3) of the FLSA protects internal complaints. There is a circuit split on this

issue, which we have not yet joined.[8]

Even if we had held in *Brock* that internal complaints are protected under the FLSA, that conclusion would not be dispositive here. Section 15(a)(3) of the FLSA and Section 510 of ERISA are not identical. Section 15(a)(3) of the FLSA extends broadly to persons that have "filed any complaint," without explicitly stating the level of formality required. 29 U.S.C. § 215(a)(3). Section 510 of ERISA, in contrast, extends only to persons that have "given information or [ ] testified" in an "inquiry or proceeding." 29 U.S.C. § 1140. The word "complaint" is not even used. Therefore, the conclusion that internal complaints are protected under the FLSA does not require a parallel conclusion under ERISA's distinct statutory language.

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[8] The First, Fifth, Sixth, Eighth, Ninth, Tenth, and Eleventh Circuits have held that internal complaints are protected under the FLSA. *See Hagan v. Echostar Satellite, L.L.C.*, 529 F.3d 617, 626 (5th Cir. 2008); *Lambert v. Ackerley*, 180 F.3d 997, 1004 (9th Cir. 1999) (en banc); *Valerio v. Putnam Assocs. Inc.*, 173 F.3d 35, 41 (1st Cir. 1999); *E.E.O.C. v. Romeo Cmty. Sch.*, 976 F.2d 985, 989 (6th Cir. 1992); *E.E.O.C. v. White & Son Enters.*, 881 F.2d 1006, 1011 (11th Cir. 1989); *Love v. RE/MAX of Am., Inc.*, 738 F.2d 383, 387 (10th Cir. 1984); *Brennan v. Maxey's Yamaha, Inc.*, 513 F.2d 179, 181 (8th Cir. 1975). The Second and Fourth Circuits have held to the contrary. *See Ball*, 228 F.3d at 364; *Lambert v. Genesee Hosp.*, 10 F.3d 46, 55 (2d Cir. 1993). Finally, the Seventh Circuit has taken a middle approach. *See Kasten v. Saint-Gobain Performance Plastics Corp.*, 570 F.3d 834, 838, 840 (7th Cir. 2009) (holding that written, but not oral, internal complaints are protected based on the inclusion of the verb "filed"), *cert. granted,* --- U.S. ----, 130 S. Ct. 1890, 176 L.Ed.2d 361 (2010). We have cited the majority approach with approval in dicta. *See Brock*, 812 F.2d at 124.

Passaic Valley provides a closer comparison. In *Passaic Valley,* we examined, as here, whether intracorporate complaints are protected under Section 507(a) of the CWA. 992 F.2d at 477. Section 507(a) provides as follows:

> "No person shall fire, or in any other way discriminate against, or cause to be fired or discriminated against, any employee or any authorized representative of employees by reason of the fact that such employee or representative has filed, instituted, or caused to be filed or instituted any proceeding under this chapter, or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter."

33 U.S.C. § 1367(a). We held in *Passaic Valley* that the term "proceeding" within Section 507(a) is ambiguous: "The term may reasonably be invoked to encompass a range of complaint activity of varying degrees of formal legal status." 992 F.2d at 478. Accordingly, we gave *Chevron* deference to the Secretary of Labor's Final Decision and Order and held that intracorporate allegations are protected under the CWA. *Id.* at 478-80.

Although it might appear so at first glance, *Passaic Valley* is not dispositive here for a couple of reasons, not the least of which is that *Passaic Valley* addresses Section 507(a) of the CWA, not Section 510 of ERISA. First, to preclude an expansive use of our holding, we did not state in *Passaic Valley* that the term "proceeding" is necessarily ambiguous in all anti-retaliation provisions. Rather, we expressly

stated that the term "proceeding" is ambiguous "*within* § 507(a) of the Clean Water Act[.]" *Id.* at 478 (emphasis added). In so holding, we avoided the rote application of *Passaic Valley* in other contexts, such as that of Section 510 of ERISA.

Second, we gave *Chevron* deference in *Passaic Valley* to the Secretary of Labor's "reasonably permissive construction" that "all good faith intracorporate allegations are fully protected from retaliation under § 507(a)[.]" *Id.* at 480. Contrary to the Secretary's suggestion here, we do not likewise owe *Chevron* deference to the Secretary's allegedly consistent reading of Section 510. Although the Department of Labor is the federal agency in charge of overseeing ERISA, *see Mack Boring & Parts v. Meeker Sharkey Moffitt, Actuarial Consultants*, 930 F.2d 267, 276 (3d Cir. 1991), we do not apply *Chevron* deference to "agency litigat[ion] positions that are wholly unsupported by regulations, ruling, or administrative practice," *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212, 109 S. Ct. 468, 102 L.Ed.2d 493 (1988). In *Passaic Valley,* we relied on the Secretary's Final Decision and Order. 992 F.2d at 477. Here, in contrast, the Secretary has not pointed to any regulations, rulings, or other material in support of its position.

Therefore, rather than base our holding on our prior case law regarding Section 507(a) of the CWA, we will ground our decision in the plain meaning of Section 510 of ERISA itself.

IV.

In summary, we agree with the Fourth Circuit's

decision in *King* that unsolicited internal complaints are not protected under Section 510 of ERISA, 29 U.S.C. § 1140, based on a plain reading of that provision's terms. We will accordingly affirm the order of the District Court.[9]

COWEN, Circuit Judge, dissenting.

Unlike the Court, I conclude that ERISA's anti-retaliation provision does indeed protect "an employee's unsolicited internal complaints to management." Accordingly, I must respectfully dissent.

The majority is obviously correct that the statutory interpretation process must begin with the actual language of Section 510. Specifically, the statutory language at issue is generally regarded as conclusive, at least in the absence of a clearly expressed legislative intention to the contrary. *See, e.g.*, *Wolk v. UNUM Life Ins. of Am.*, 186 F.3d 352, 355 (3d Cir. 1999). I further agree with the majority that "the first step is to determine whether [Section 510] has a plain and unambiguous meaning." *Dobrek v. Phelan*, 419 F.3d 259, 263 (3d Cir. 2005) (citing *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450, 122 S. Ct. 941, 151 L.Ed.2d 908 (2002)). I, however, believe that the statutory language used in this anti-retaliation provision is *ambiguous*. In

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[9] In light of our disposition, we decline to address A.H. Cornell's additional arguments that Edwards cannot maintain a claim against Cornell and Closterman because they "merely served as the company's agents," (A.H. Cornell Br. at 7), and that, regardless of the outcome of this appeal, the allegations in Edwards's complaint fail to satisfy the pleading requirements articulated by the Supreme Court in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L.Ed.2d 929 (2007).

fact, as explained below, I find it highly doubtful that Congress could have ever intended for its anti-retaliation provision to apply in the manner suggested by the majority, in particular because the majority's interpretation leaves totally unprotected a certain category of conduct (as well as the employees who may engage in such conduct) that this remedial statutory provision was enacted to protect in the first place. *See, e.g.*, *Disabled in Action of Pa. v. Southeastern Pa. Transp. Auth.*, 539 F.3d 199, 210 (3d Cir. 2008) (stating that we "avoid constructions that produce 'odd' or 'absurd results' or that are 'inconsistent with common sense'" (quoting *Public Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 454, 109 S. Ct. 2558, 105 L.Ed.2d 377 (1989); 2A N. Singer, *Sutherland Statutes and Statutory Construction* § 45:12, at 92 (6th ed. 2000))).

Initially, the majority does acknowledge at least some of the broad considerations underlying ERISA and its anti-retaliation provision, but it generally fails to give these various considerations the weight they deserve. Accordingly, the majority recognizes that ERISA, as a remedial statute, "should be liberally construed in favor of protecting the participants in employee benefit plans." *IUE AFL-CIO Pension Fund v. Barker & Williamson, Inc.*, 788 F.2d 118, 127 (3d Cir. 1986) (citations omitted). It likewise states that: (1) ERISA is a comprehensive statute designed to promote the interests of employees and their beneficiaries, *see, e.g.*, *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90, 103 S. Ct. 2890, 77 L.Ed.2d 490 (1983); (2) the statute imposes different standards and requirements with respect to the operation of the plans themselves; *id.* at 91, 103 S. Ct. 2890; (3) Congress similarly included various safeguards in order to deter abuse and "'to

completely secure the rights and expectations brought into being by this landmark reform legislation,'" *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 137, 111 S. Ct. 478, 112 L.Ed.2d 474 (1990) (quoting S.Rep. No. 93-127, at 36 (1973)); and (4) Section 510, designed to eliminate interference with the rights protected by ERISA, represents one of these critical statutory safeguards, *id.* I further note that "Congress viewed this section as a crucial part of ERISA because, without it, employers would be able to circumvent the provision of promised benefits." *Id.* at 143, 111 S. Ct. 478 (citing S. Rep. No. 93-127, at 35-36; H.R. Rep. No. 93-533, at 17 (1973)). In other words, this anti-retaliation provision plays a very important and even essential role in the proper implementation of the whole ERISA scheme because it actually "'helps to make [ERISA's] promises credible.'" *Inter-Modal Rail Employees Ass'n v. Atchison, Topeka & Santa Fe Ry. Co.*, 520 U.S. 510, 515, 117 S. Ct. 1513, 137 L.Ed.2d 763 (1997) (quoting *Heath v. Varity Corp.*, 71 F.3d 256, 258 (7th Cir. 1995)).

Far from liberally construing this remedial legislation in favor of the very persons it was designed to protect, the majority adopts an ultimately unsustainable interpretation. At least at times, it appears to follow the very narrow approach adopted by the Fourth Circuit in *King v. Marriott International, Inc.*, 337 F.3d 421 (4th Cir. 2003), as opposed to the more moderate position taken by the Second Circuit in *Nicolaou v. Horizon Media, Inc.*, 402 F.3d 325 (2d Cir. 2005) (per curiam). However, even the Second Circuit disagreed with the Fourth Circuit's belief "that Congress's use of the phrase 'testify or about to testify' dictates" the conclusion "that Section 510 protects those who engage in 'something more formal than written or

oral complaints made to a supervisor.'" *Id.* at 330 n. 3 (quoting *King*, 337 F.3d at 427). The *Nicolaou* court quite properly read this "reference to testimony" language as "wholly irrelevant to our understanding of the language 'given information . . . in any inquiry or proceeding.'" *Id.*

More broadly, I acknowledge that the Fifth Circuit did not examine this issue in any real detail in its ruling in *Anderson v. Electronic Data Systems Corp.*, 11 F.3d 1311 (5th Cir. 1994). On the other hand, the majority itself quotes the Ninth Circuit's reasonable and ultimately persuasive explanation for why it concluded in *Hashimoto v. Bank of Hawaii*, 999 F.2d 408 (9th Cir. 1993), that Section 510 does, in fact, encompass internal workplace complaints. It bears repeating here:

> . . . . The normal first step in giving information or testifying in any way that might tempt an employer to discharge one would be to present the problem first to the responsible managers of the ERISA plan. If one is then discharged for raising the problem, the process of giving information or testifying is interrupted at its start: the anticipatory discharge discourages the whistle blower before the whistle is blown.

Id. at 411. Like the Ninth Circuit, I find it difficult to believe that Congress could have ever intended to exclude from the protection of its remedial anti-retaliation provision employees who are terminated because they bring an ERISA-related problem to the attention of their superiors.

Likewise, the majority's narrow interpretation of the specific term "inquiry" appears questionable at best. In

addition to leaving the crucial "first step" unprotected, the Second Circuit's whole "inquiry" standard could be difficult to apply and even unworkable in certain circumstances. Certain conduct may clearly constitute an "inquiry," such as the plaintiff's alleged activities in *Nicolaou* itself, which included contacting her employer's outside attorney regarding an alleged underfunding problem and then, after the lawyer conducted an inquiry of his own and evidently at the request of the lawyer, meeting with both him and the president of the company. *Nicolaou,* 402 F.3d at 326-27, 329-30. On the other hand, an internal workplace complaint would quite naturally constitute a preliminary step before a formal or informal inquiry is launched (and such a complaint may even have been necessary to trigger the investigation in the first place). However, where does one draw the line between such an initial step, which the Second Circuit and majority have held is not protected by the statutory provision, and otherwise "protected" statements purportedly made as part of some sort of inquiry? For instance, suppose an employee like Edwards complains to her superior, the superior asks some follow-up questions, and the employee responds to these questions. Are the informal responses to some impromptu questions to be regarded as protected because they evidently were made as part of an "inquiry?" In turn, why should such responses be protected while, at the same time, an employer is essentially permitted (and perhaps, in essence, encouraged) to fire an employee immediately after she makes an informal complaint instead of conducting an investigation of some sort?

In addition, the majority goes on to hold that Section 510 only protects employees who give

information as part of the inquiry, as opposed to those individuals who actually conduct the inquiry and thereby "received information." Admittedly, the Second Circuit in *Nicolaou* did deal with a plaintiff who had, inter alia, been invited to attend a meeting with both the president and outside counsel and stated her opinion that a 401(k) plan was underfunded. *Id.* Nevertheless, the majority's approach appears to be highly questionable at best insofar as it leaves an entire class of employees, who, given their responsibility to conduct potentially sensitive and damaging investigations into possible ERISA violations and related matters, would need protection from retaliation even more than employees who merely answers some questions.

Even though these various considerations clearly weigh in favor of the more expansive interpretation offered by the Fifth and Ninth Circuits, Edwards, and the Secretary, I might still be inclined to agree with the majority's ultimate result here based on the language actually used in the statutory provision. Nevertheless, analogous Third Circuit decisions clearly indicate that the language in Section 510 is ambiguous and that this Court should, in turn, interpret such language as encompassing internal workplace complaints.

As a general matter, I recognize that the case law addressed different statutes using different statutory language, and these decisions accordingly do not represent technically binding precedents at this juncture. The fact that Congress has chosen to use different terms in different anti-retaliation provisions should also not be overlooked. Accordingly, I do not suggest that Section 510 should be interpreted as

broadly as its Title VII counterpart, which, among other things, expressly covers employees who have "opposed any practice made an unlawful employment practice by [Title VII.]" 42 U.S.C. § 2000e-3(a). Nevertheless, this Court obviously should strive to treat relatively similar statutory provisions, contained in similar remedial federal statutes, in a clear and consistent fashion. In any case, as highlighted below, at least some of the terms used in Section 510 are actually more expansive than the equivalent terms contained in other anti-retaliation provisions.

I start with a case that actually held that the term "proceeding" is ambiguous and gave *Chevron* deference to the Secretary's formal determination that intracorporate complaints are, in fact, protected activities: *Passaic Valley Sewerage Commissioners v. United States Department of Labor*, 992 F.2d 474 (3d Cir. 1993).

The *Passaic Valley* Court held that the statutory term "proceeding," which is contained in both the CWA provision and its ERISA counterpart, is "ambiguous" because it "may reasonably be invoked to encompass a range of complaint activity of varying degrees of formal legal status." *Id.* at 478. It then added "that the [CWA's] purpose and legislative history allow, and even necessitate, extension of the term 'proceeding' to intracorporate complaints." *Id.* In other words, the protection provided by the section "would be largely hollow if it were restricted to the point of filing a formal complaint with the appropriate external law enforcement agency." *Id.* "Employees should not be discouraged from the normal route of pursuing internal remedies before going public with their good faith

allegations." *Id.* Instead, they should be encouraged to notify management of their observations before any formal investigations and litigation are initiated, thereby providing management with the opportunity to correct, justify, or clarify policies or otherwise facilitate prompt remediation and compliance. *Id.* at 478-79. Furthermore, an employee's non-frivolous complaint should not have to be guaranteed to withstand the scrutiny of review before meriting legal protection "for the obvious reason that such a standard would chill employee initiatives in bringing to light perceived discrepancies in the workings of their agencies." *Id.* at 479. In addition, the Court in *Passaic Valley* observed that "the whistle-blower provision of the Clean Water Act mirrors that of several other federal environmental, safety and energy statutes," which have also been broadly construed in the case law. *Id.* (footnote omitted) Therefore, "[a]lthough the present case is the first to present us with this issue in the context of the Clean Water Act, the weight of other circuits' precedent reviewing analogous statutes concurs with the Secretary's own broad inclusion of intracorporate complaints within the protective scope of the statute." *Id.* at 480.

This reasoning clearly supports interpreting Section 510, which is generally analogous to the anti-retaliation section of the CWA, as encompassing internal workplace complaints. In turn, I have no choice but to reject the majority's efforts to minimize and distinguish this prior ruling.[10]

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[10] I do, however, agree with the majority's finding that we do not owe *Chevron* deference to the Secretary's reading of Section 510.

In particular, its assertion that the *Passaic Valley* Court attempted to avoid any "rote application" of its holding overlooks the crucial fact that the Court itself turned to other anti-retaliation provisions in its analysis of the CWA section. For instance, it noted that the anti-retaliation provision in the FLSA is among the statutory provisions that have been expansively construed "to lend broad protective coverage to internal complainants." *Id.* at 479. In any case, I do not believe that following the example set in *Passaic Valley* by carefully taking into account a prior Third Circuit opinion represents any kind of "rote" exercise.

Furthermore, the CWA provision expressly prohibits discrimination against any employee who has "filed, instituted, or caused to be filed or instituted any proceeding under this chapter, or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter." 33 U.S.C. § 1367(a). At least on the surface, this "filed" and "instituted" language evidently contemplates something more formal than, inter alia, an unsolicited internal complaint to one's superiors. Therefore, I find that Section 510, with its "given information" and "inquiry" language, appears to be even broader than its environmental counterpart, addressed (and broadly construed) in Passaic Valley.

In addition, the Court's ruling in *Brock v. Richardson*, 812 F.2d 121 (3d Cir. 1987), provides yet further support for concluding that Section 510 protects unsolicited internal complaints.

Initially, the majority is correct that *Brock* addressed the question of whether the anti-retaliation provision of the FLSA is triggered by an employer's

ultimately mistaken belief that an employee has engaged in otherwise protected activity under the statute. *Id.* at 122-25. In answering this question in the affirmative, the Court in *Brock* quite appropriately turned to the same kind of broad policy considerations discussed in *Passaic Valley*. *Id.* at 123-25. For instance, it noted that Congress, instead of seeking to secure compliance through detailed and ongoing governmental supervision of employer payrolls, put in place a system relying on information and complaints from the employees itself. *Id.* at 124. "Thus, the [Supreme] Court has made clear that the key to interpreting the anti-retaliation provision is the need to prevent employees' 'fear of economic retaliation' for voicing grievances about substandard conditions.'" *Id.* (quoting *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292, 80 S. Ct. 332, 4 L.Ed.2d 323 (1960)). Significantly, the *Brock* Court even indicated a willingness to go beyond the bare language of the statutory provision itself, stating that "courts interpreting the anti-retaliation provision have looked to its animating spirit in applying it to activities that might not have been explicitly covered by the language." *Id.* As an example, it turned to the Tenth Circuit's ruling in *Love v. RE/MAX of America, Inc.*, 738 F.2d 383 (10th Cir. 1984), which applied the anti-retaliation provision "to protect employees who have protested Fair Labor Standards Act violations to their employers."[11] *Brock*, 812 F.2d at 125 (citing *Love*, 738 F.2d at 387).

The majority points out that the anti-retaliation

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[11] It is significant that the *Passaic Valley* Court also relied on *Love* in its analysis of the CWA's anti-retaliation provision. *Passaic Valley*, 992 F.2d at 479.

provision in the FLSA differs from the ERISA counterpart. I agree, but the differences here actually weigh against the interpretation offered by the majority. Just like the anti-retaliation provision in the CWA, the FLSA provides that it is unlawful to discharge or discriminate against an employee because he or she "has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee." 29 U.S.C. § 215(a)(3). As previously noted with respect to *Passaic Valley,* this language arguably contemplates some sort of formal filing. *See, e.g., Ball v. Memphis Bar-B-Q Co.*, 228 F.3d 360, 364 (4th Cir. 2000) (finding that FLSA does not protect intra-company complaints because, among other things, the term "proceeding" was "modified by attributes of administrative or court proceedings," the term "instituted" indicates "a formality that does not attend an employee's oral complaint to his supervisor," and "testimony" consists of "statements given under oath or affirmation" (citations omitted)). On the other hand, Section 510 refers to an "inquiry," as opposed to merely a "proceeding," as well as "giv[ing] information," in contrast to mere "testimony." As even the majority recognizes, the Second Circuit accordingly observed that "the plain language of ERISA Section 510" is "unambiguously broader in scope than Section 15(a)(3) of FLSA." *Nicolaou,* 402 F.3d at 328.

In the end, I am unable to agree with the majority's ruling here in light of the statutory language at issue, the expansive purposes and principles underpinning ERISA and its anti-retaliation provision, and (especially)

prior decisions[12] by this very Court broadly interpreting similar anti-retaliation statutes in other federal statutes. I accordingly would reverse the ruling of the District Court and remand for further proceedings.

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[12] In addition to the rulings in *Passaic Valley* and *Brock*, I further note that this Court adopted a somewhat similar approach to the False Claims Act's anti-retaliation provision in *Hutchins v. Wilentz, Goldman & Spitzer*, 253 F.3d 176 (3d Cir. 2001). The *Hutchins* Court noted, inter alia, that protected activities "can include internal reporting and investigation of an employer's false or fraudulent claims." *Id.* at 187 (citing *United States ex rel. Yesudian v. Howard Univ.*, 153 F.3d 731, 742 (D.C. Cir. 1998)).

APPENDIX B

UNITED STATES DISTRICT COURT,
E.D. PENNSYLVANIA

Shirley EDWARDS, Plaintiff
v.
A.H. CORNELL AND SON, INC., et al., Defendants.

No. 09-cv-1184. July 23, 2009.

MEMORANDUM AND ORDER

JOYNER, District Judge.

Presently before the Court are Defendants' Motion to Dismiss Plaintiff's Amended Complaint and Plaintiff's Response thereto. For the reasons set forth below, Defendants' Motion to Dismiss is granted.

I. BACKGROUND

Plaintiff Shirley Edwards is a former employee of Defendant A.H. Cornell and Son, Inc.[1] Defendant A.H. Cornell and Son, Inc. ("A.H. Cornell") is a Pennsylvania corporation that performs contracting

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[1] The facts are presented in the light most favorable to the Plaintiffs. *Phillips v. County of Allegheny*, 515 F.3d 224, 233 (3d Cir. 2008).

and construction services. Defendant Melissa J. Closterman ("Closterman") manages or oversees daily operations at A.H. Cornell, including oversight of Plaintiff while she was employed by A.H. Cornell. Plaintiff alleges that Closterman was "directly responsible for terminating Plaintiff." Defendant Scott A. Cornell ("Cornell") is an executive of A.H. Cornell and was responsible for overseeing the terms and conditions of Plaintiff's employment. Plaintiff alleges that Cornell "participated in the termination of Plaintiff's employment."

According to Plaintiff's Amended Complaint,[2] in or around February, 2006, Defendants hired Plaintiff to establish a human resources department at A.H. Cornell. Plaintiff asserts that while she was employed by Defendants, she learned that Closterman was "engaging in unlawful acts." Plaintiff further asserts that Closterman requested that Plaintiff engage in these allegedly unlawful acts.

Specifically, Plaintiff asserts that an employee of A.H. Cornell, who sustained a work-related injury continued to collect worker's compensation insurance for being out of work after the employee had returned to work. Plaintiff claims this employee used a false social security number and information to obtain worker's compensation in the first place. Plaintiff alleges that Closterman directed Plaintiff to make false statements to Defendants' worker's compensation carrier regarding the injured employee. Plaintiff also alleges that in the last several weeks of her employment, Closterman directed Plaintiff to provide false information to a disability insurance carrier.

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[2] Plaintiff filed an Amended Complaint on June 2, 2009.

Plaintiff further asserts that Defendants had a group health insurance plan, governed by ERISA, that "was being administered illegally within Defendant and on a discriminatory basis." Specifically, Plaintiff alleges that Closterman lied to "many employees" about what their contributions would be in order to dissuade employees from opting into the benefits and also did not offer certain employees health benefits at all. Plaintiff avers that Defendants, through Closterman, withheld and concealed required group plan information from employees and "unlawfully enroll[ed] non-citizens in the ERISA-qualifying life, disability and/or group health plan."

Plaintiff alleges that she "objected to participating in a scheme to commit criminal fraud as to Defendants' disabilty insurance carrier, worker's compensation insurance carrier, and health insurance carrier." She further states that she "was directed to commit and/or to participate" in the fraud in close proximity to her termination, which was on February 11, 2009.

Plaintiff's Complaint asserts two Counts: (1) Violations of ERISA-Section 510, 29 U.S.C. § 1140 (Retaliation) and (2) Common-Law Wrongful Discharge. Plaintiff bases her section 510 claim on the allegation that Defendants terminated her for "object[ing] to and/or complain[ing] to Defendants' management or owners" about Defendants' alleged ERISA violations. She asserts that her actions were protected activity under ERISA and thus her termination violated the retaliation provision in ERISA, section 510. Defendants have filed a Motion to Dismiss Plaintiff's Amended Complaint.

II. STANDARD OF REVIEW

Pursuant to Federal Rule of Civil Procedure 12(b)(6), in response to a pleading, a Defendant may file a motion asserting that the Plaintiff's complaint "[fails] to state a claim upon which relief can be granted." In analyzing a Rule 12(b)(6) motion to dismiss, we "accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief." *Phillips v. County of Allegheny*, 515 F.3d 224, 233 (3d Cir. 2008) (citations omitted). "To survive a motion to dismiss, a civil plaintiff must allege facts that 'raise a right to relief above the speculative level. . . .'" *Id.* at 232 (quoting *Bell Atl. Corp. v. Twombley*, 550 U.S. 544, 127 S. Ct. 1955, 1965, 167 L.Ed.2d 929 (2007)). In other words, the plaintiff must provide "enough facts to raise a reasonable expectation that discovery will reveal evidence of the necessary element[s]" of a particular cause of action. *Id.* at 234. This "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombley*, 127 S. Ct. at 1964-65. In ruling on a Rule 12(b)(6) motion to dismiss, the court may consider documents "integral to or explicitly relied upon in the complaint." *In re Rockefeller Sec. Lit.*, 184 F.3d 280, 287 (3d Cir. 1999).

III. DISCUSSION

A. ERISA-Section 510, 29 U.S.C. § 1140

ERISA, section 510, codified at 29 U.S.C. § 1140, provides in relevant part:

> It shall be unlawful for any person to discharge . . . or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to [ERISA] or the Welfare and Pension Plans Disclosure Act . . . .

29 U.S.C. § 1140 (2006 & Supp. 2008). Section 510 has been referred to as ERISA's "anti-retaliation" provision, or "whistleblower" provision because it prohibits retaliation against a person who has participated in certain protected activity under section 510. *See, e.g.*, *Hashimoto v. Bank of Hawaii*, 999 F.2d 408, 327 (9th Cir. 1993); *King v. Marriott International*, 337 F.3d 421, 427 (4th Cir. 2003). Specifically, section 510 makes it unlawful to retaliate against a person for giving information, testifying, or being about to testify in an "inquiry or proceeding" relating to ERISA or certain other statutory provisions. 29 U.S.C. § 1140.

Defendants' Motion to Dismiss asserts, *inter alia,* that Plaintiff has failed to allege conduct that is protected under the anti-retaliation provisions of ERISA, section 510. The Third Circuit has not yet addressed the scope of ERISA's anti-retaliation provision and, more specicially [sic], whether internal workplace complaints are protected activity under section 510. Only four circuits-the Ninth, the Fifth, the Fourth, and the Second-have considered this issue, all with outcomes resolutions.

The Ninth Circuit was the first to consider the scope of ERISA's anti-retaliation provision in *Hashimoto v. Bank of Hawaii*, 999 F.2d 408 (9th Cir. 1993). There, the Court found that the statute was

"clearly meant to protect whistle blowers." *Hashimoto*, 999 F.2d at 411. Thus, the Court reasoned, the language "has given information or has testified in any inquiry or proceeding relating to [ERISA]" could be "fairly construed" to include "[t]he normal first step" of "[present[ing] the problem to the responsible managers of the ERISA plan." *Id.* Because discharging a person for raising the problem in the first place would "discourage[ ] the whistle blower before the whistle is blown," the Ninth Circuit held that making informal, workplace complaints to managers regarding potential ERISA violations is protected activity under section 510. *Id.*

The Fifth Circuit next addressed the issue in *Anderson v. Electronic Data Systems Corporation*, 111 F.3d 1311 (5th Cir. 1994), within the context of determining whether ERISA preempted a plaintiff's state wrongful discharge action. In *Anderson*, after reciting the language of section 510, the Fifth Circuit disregarded the language "inquiry or proceeding" and found broadly that the retaliation provision "prohibits the discharge or other adverse treament of any person because he has given information or testimony relating to ERISA." [sic] 111 F.3d at 1315. Thus, the Court held that "a refusal to commit violations of ERISA and reporting such violations to management" was protected activity that fell within the ambit of the enforcement provisions of ERISA section 510. *Id.* at 1314.

In *King v. Marriott International*, 337 F.3d 421 (4th Cir. 2003), the Fourth Circuit analyzed the scope of the anti-retaliation provision in section 510 and came to a result opposite that of the Ninth and Fifth

Circuits. Reasoning that the anti-retaliation provision in section 510 is narrower than that of Title VII of the Civil Rights Act of 1964, the *King* Court found that the phrase "testified or is about to testify" suggests that the phrase "inquiries or proceedings" is limited to legal or administrative inquiries or proceedings, "or at least to something more formal than written or oral complaints made to a supervisor." 337 F.3d at 427. The Court held, therefore, that filing internal complaints with supervisors, co-workers, or an employer's attorney is not protected activity under section 510 because filing such complaints does not rise to the level of testifying or being about to testify in a proceeding of any kind, nor is it giving information in such a proceeding. *Id.* at 428.

The Second Circuit most recently took up the issue in *Nicolaou v. Horizon Media Incorporated*, 402 F.3d 325 (2d Cir. 2005). In *Nicolauou* [sic], the Court compared the language of section 510 to the retaliation provisions of both the Fair Labor Standards Act ("FLSA") and Title VII.[3] 402 F.3d at 327-29. It found

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[3] Section 704(a) of Title VII, codified at 42 U.S.C. § 2000e-3(a) provides broadly that:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

By contrast, section 15(a)(3) of the FLSA, codified at 29 U.S.C. § 215(a)(3), provides protection against retaliation for a more narrow scope of conduct, stating that it shall be unlawful

> to discharge or in any other manner discriminate against any employee because such employee has filed any

that use of the term "inquiry" in ERISA implies something less formal and unambiguously broader than use of the term "proceeding" in the FLSA. *Id.* at 328. The Second Circuit then looked to the dictionary definitions of the terms "proceeding" and "inquiry." *Id.* at 329. Citing the *Black's Law Dictionary* definition of "inquiry" as "a request for information" and the *Webster's Third New International Dictionary* definition as "the act or an instance of seeking truth, information, or knowledge about something" or "a request for information," the Court found that an "informal gathering of information thus falls within the plain meaning of 'inquiry'" and is, therefore protected activity under section 510. *Id.* (internal citations omitted). The Court concluded that "the proper focus is not on the formality or informality of the circumstances under which an individual gives information, but rather on whether the circumstances can fairly be deemed to constitute an 'inquiry.'" *Id.* at 330. The Court thus held that if the defendant company's attorney contacted the plaintiff to meet with the president of the defendant company in order to provide information regarding alleged ERISA violations at a meeting initiated by the attorney, her actions would be protected under section 510 because that meeting would fall within the definition of an

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complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to testify in any such proceeding . . . .

"inquiry," regardless that it was not formal or external. *Id.*

Looking to the Second and Fourth Circuits, Defendants move to dismiss Plaintiff's Amended Complaint asserting that the conduct for which Plaintiff was allegedly terminated does not constitute "giving information or testifying in an inquiry or proceeding related to ERISA" as required by ERISA, section 510, because her objections or complaints were not part of a formal or informal inquiry or proceeding.[4] In response, Plaintiff argues that informal workplace objections and complaints to management are protected activity under ERISA. Plaintiff draws support from the Second, Ninth and Fifth Circuits.[5]

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[4] Defendants further move to dismiss based on the assertion that Plaintiff failed to allege that Defendants had a specific intent to violate ERISA. Additionally, Defendants argue that even if Plaintiff did properly allege a retaliation claim under section 510, the claim should be dismissed against Closterman and Cornell because they were not Plaintiff's employer but were merely employees of Plaintiff's employer and thus not subject to section 510. Because we find that Plaintiff's alleged conduct does not constitute the giving of information, testifying, or being about to testify in an inquiry or proceeding, we need not reach Defendants' alternative grounds for dismissal.

[5] Plaintiff also cites to *Jorgensen v. Prudential Ins. Co. of America*, 852 F. Supp. 255 (D.N.J. 1994). In *Jorgensen*, within the context of determining whether ERISA preempted a Plaintiff's state law claims, the Court found that the plaintiff "ha[d] not given information or testified in an inquiry or proceeding relating to ERISA, as required by ERISA § 510." 852 F. Supp. at 262-63. Rather than finding that the plaintiff's alleged complaints to his supervisors were, therefore, not protected under section 510, the Court stated that the Ninth Circuit in *Hashimoto* had "extended ERISA whistleblower protections to include the 'first step' of raising the problem to the employee's superiors." *Jorgensen*, 852 F. Supp. at 263.

Upon consideration of the statutory language in the relevant provision, this Court finds the Second Circuit's analysis in *Nicolaou* to be persuasive. Thus, we agree that the proper inquiry is whether the Plaintiff's alleged objections and complaints to management in the present case were given as part of an inquiry.[6] *See Nicolaou*, 402 F.3d at 330. After reviewing the allegations in the Amended Complaint, we find that they were not. Plaintiff alleges that she "objected to and/or complained to Defendants' management or owners" about Defendants' alleged ERISA violations. Plaintiff does not allege that anyone requested information from her or initiated contact with her in any way regarding the alleged ERISA violations. *Compare with Nicolaou*, 402 F.3d at 330 (finding conduct protected under section 510 where a meeting to discuss alleged ERISA violations was initiated by the defendant's attorney as part of the attorney's inquiry into the alleged ERISA violations). Nor does she allege that she was involved in any type of formal or informal gathering of information. *See Nicolaou*, 402 F.3d at 330 (finding that the information gathering of information falls within the meaning of "inquiry" and is thus covered under section 510). She states merely that she objected to or complained about certain conduct by Defendants. Thus, viewing the facts in the light most favorable to the non-moving party, Plaintiff has failed to properly

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[6] The Plaintiff has not in any way alleged that she was part of a proceeding or that she gave testimony or was about to give testimony at an inquiry or proceeding. Thus, the only relevant inquiry is whether she gave information as part of an inquiry.

allege any conduct that would fall within the ambit of the retaliation provision in section 510. Defendants' Motion is, therefore, granted.

B. Common-Law Wrongful Discharge

Having dismissed Plaintiff's only federal claim, the Court declines to exercise supplemental jurisdiction over Plaintiff's remaining state law claim. *See* 28 U.S.C. § 1367.

CONCLUSION

For the foregoing reasons, Defendants' Motion to Dismiss is GRANTED as to Plaintiff's ERISA, section 510 claim. As we decline to exercise supplemental jurisdiction, Plaintiff's common-law wrongful discharge claim is DISMISSED with leave to Plaintiff to re-file it in state court. An appropriate order follows.

ORDER

AND NOW, this 23rd day of July, 2009, it is hereby ORDERED Defendants' Motion to Dismiss is GRANTED as to Plaintiff's ERISA, section 510 claim. Furthermore, the Court declines to exercise supplemental jurisdiction. Plaintiff's common-law wrongful discharge claim is, therefore, DISMISSED with leave to Plaintiff to re-file it in the appropriate state court.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 09-3198

SHIRLEY EDWARDS, Appellant

v.

A.H. CORNELL AND SON, INC., D/B/A AH CORNELLS; MELISSA CLOSTERMAN; SCOTT A. CORNELL

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. No. 2-09-cv-01184)
District Judge: Honorable J. Curtis Joyner

SUR PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC

Present: McKEE, *Chief Judge*; SLOVITER, SCIRICA, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, VANASKIE and COWEN*, *Circuit Judges*.

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* Judge Cowen's vote is limited to panel rehearing only.

The petition for rehearing filed by Appellant having been submitted to all judges who participated in the decision of this court, and to all the other available circuit judges in active service, and a majority of the judges who concurred in the decision not having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is hereby DENIED.

BY THE COURT:
/s/ D. Michael Fisher
Circuit Judge

Dated: July 26, 2010
DWB/cc:

Justin L. Swidler, Esq.
Christie M. Flamm, Esq.
Walter H. Flamm, Jr., Esq.
Eric C. Lund, Esq.
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No. 10-732

In The

Supreme Court of the United States

SHIRLEY EDWARDS,

Petitioner,

v.

A.H. CORNELL AND SON, INC., D/B/A AH CORNELLS AND MELISSA CLOSTERMAN AND SCOTT A. CORNELL,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

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QUESTIONS PRESENTED

1. Whether the Court of Appeals for the Third Circuit correctly affirmed the District Court's dismissal of Petitioner's complaint, which failed to allege that Petitioner was terminated because she gave information or testified, or was about to testify, in any inquiry or proceeding relating to Section 510 of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1140.

2. Whether a conclusory allegation, with no factual support, that Petitioner "objected and/or complained to" management about possible violations of ERISA is a sufficient pleading stating a plausible claim for relief under Section 510 of ERISA.

OBJECTION TO PETITIONER'S QUESTION PRESENTED

In addition to Petitioner's question presented to the Court, Respondents present the question of whether Petitioner's Complaint is sufficient as a matter of law when it fails to plead any facts that Petitioner "objected and/or complained to" management about possible violations of ERISA. Respondents raised this issue in the District Court and before the Court of Appeals for the Third Circuit.

CORPORATE DISCLOSURE STATEMENT

Respondent A.H. Cornell and Son, Inc. is a family-owned company. It is not owned by any parent corporation or any publicly-held company owning 10% or more of Respondent A.H. Cornell and Son, Inc.'s stock.

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STATEMENT

Petitioner does not state any compelling reasons to support a writ of certiorari in this case. Petitioner alleges that A.H. Cornell administered a group health plan on a discriminatory basis, withheld group plan information from employees, and enrolled non-citizens in the health plan. Resp. App. 7-8. Petitioner alleges that she "objected and/or complained to [Respondents'] management" about Respondents' conduct. *Id.* Petitioner contends that these scarce facts constitute protected activity under Section 510 of ERISA, 29 U.S.C. § 1140.

No Circuit Courts of Appeals have held that unsolicited, internal complaints constitute protected activity under Section 510 of ERISA, 29 U.S.C. § 1140. All of the Courts of Appeals which have analyzed Section 510 of ERISA unanimously agree that a complainant must do more than unilaterally voice concerns to an employer. Section 510 contains a specific requirement that the complainant "has given information or has testified or is about to testify in any inquiry or proceeding" 29 U.S.C. § 1140. These cases are discussed at length, *infra*. Simply put, Section 510 clearly means what it says. Section 510's use of the words "inquiry" and "proceeding" means that the complaining employee must be engaged in an interactive investigation process. The complaining employee must voice concerns in response to a request, whether from the employer or an investigating agency. Section 510 does not protect an employee for

unilaterally stating an opinion about possible ERISA violations outside the confines of a formal process.

Further, there is no conflict between the Courts of Appeals which have considered the issue. Petitioner cites to two cases, *Anderson v. Electronic Data Systems*, 11 F.3d 1311 (5th Cir. 1994) and *Hashimoto v. Bank of Hawaii*, 999 F.2d 408 (9th Cir. 1993) and argues that the holdings from these cases support a conclusion that Section 510 protects unsolicited internal complaints about ERISA violations. These cases support no such conclusion. Both cases addressed only whether ERISA preempts analogous state law whistleblower complaints. Neither case examined whether the claimants in those cases had any protection under Section 510 for unsolicited, internal complaints. Given that both cases addressed preemption, it would have been impossible and illogical for either of the Courts of Appeals to make any such pronouncement in those cases.

Finally, Petitioner's complaint pleads absolutely no facts about how she voiced her supposed concerns. Not only is the complaint deficient as a matter of law, but it leaves it impossible for this Court to make any important pronouncement of federal law. The mystery surrounding the facts of Petitioner's important whistleblowing conduct creates a factual void. Granting a writ of certiorari in this case would be unproductive since subsequent litigants and Courts that address Section 510 would not be able to compare their facts to this case. In sum, this is a poor vehicle for certiorari.

Accordingly, this Court should deny the petition for a writ of certiorari.

STATEMENT OF FACTS

Factual Background

Respondent A.H. Cornell & Son, Inc. ("A.H. Cornell"), is a family-owned construction company. Pet. App. 2a. It provides commercial and residential construction services such as paving, snow removal, and recycling. Pet. App. 3a. A.H. Cornell hired Petitioner in March, 2006, to establish a human resources department. *Id.* A.H. Cornell had a group health plan that was governed by ERISA. Petitioner alleges that A.H. Cornell administered the group health plan on a discriminatory basis, withheld group plan information from employees, and enrolled non-citizens in the health plan. *Id.* Petitioner alleges that she "objected and/or complained to [Respondents'] management" about Respondents' conduct. *Id.* Petitioner further claims that she was terminated for the "aforesaid inquiries, objections, opposition and/or complaints about ERISA violations." *Id.* No other specifics about Petitioner's protests are set forth in her complaint. Resp. App. 7-8.

Course of Proceedings Below

On March 18, 2009, Petitioner filed a complaint against Respondents A.H. Cornell, Scott A. Cornell,

and Melissa Closterman. *Id.* Scott Cornell is one of the owners and President of A.H. Cornell; Melissa is his sister, who is also employed by the Company. Resp. App. 3. Petitioner initiated this action under ERISA, 29 U.S.C. § 1001, *et seq.* Pet. App. 4a. On May 18, 2009, Respondents filed a motion to dismiss that complaint because the complaint was insufficient as a matter of law. *Id.*

On July 23, 2009, the District Court granted Respondents' Motion to Dismiss because Petitioner failed to allege any conduct which would bring her within the ambit of Section 510 of ERISA. *Id.* The District Court declined to exercise supplemental jurisdiction over Petitioner's state law claim and consequently dismissed the entire case. *Id.*

Petitioner appealed to the United States Court of Appeals for the Third Circuit. The sole issue facing the Court of Appeals was whether the District Court erred in finding that "unsolicited internal complaints are not protected activities under the anti-retaliation provisions of Section 510 of ERISA. . . ." Pet. App. 5a. The Court of Appeals analyzed (a) the plain language of Section 510 of ERISA; (b) the decisions of the Courts of Appeals for the Second, Fourth, Fifth, and Ninth Circuits which discuss Section 510 of ERISA; (c) the background of ERISA; and (d) analogous Third Circuit precedent analyzing the whistleblower provisions of Section 15(a)(3) of the Fair Labor Standards Act (29 U.S.C. § 215(a)(3)) and Section 507(a) of the Clean Water Act (33 U.S.C. § 1367(a)). Pet. App. 5a-18a. The thorough analysis of the Third Circuit Court

of Appeals led to the conclusion that unsolicited internal complaints are not protected under Section 510 of ERISA. Pet. App. 19a. The Court correctly noted that there is no disagreement between the Circuits on the substance of Section 510. Pet. App. 7a-10a. The Court observed that while some Circuits like the Fifth and the Ninth have dealt with cases involving Section 510, those cases were faced with the issue of whether Section 510 preempted other claims, and they did not involve a substantive analysis of the issue raised in this case. The Court of Appeals noted that the Circuits which have actually analyzed Section 510's language on a substantive basis, including the Fourth and the Second Circuits, reached the conclusion that Section 510's plain language did not protect unsolicited internal complaints. Pet. App. 10a-11a.

Objections to Petitioner's Statement of Facts

This matter comes before the Court on a Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). Thus, while Respondents dispute the accuracy of the minimal facts put forth by Petitioner, for the purposes of this Appeal, Respondents assume that they are true as pled in the Complaint.

REASONS FOR DENYING THE PETITION

A. A writ of certiorari is not warranted in this case because there is no significant dispute between the Circuit Courts of Appeals which have analyzed the meaning of Section 510 of ERISA.

1. The plain language of ERISA Section 510 supports a simple conclusion and the Circuit Courts of Appeals that have analyzed this language in detail (the Second, Third, and Fourth) are all in agreement about the meaning of that language.

In relevant part, ERISA Section 510, entitled "Interference with Protected Rights" provides that

> [i]t shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan [or] this subchapter . . . or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan [or] this subchapter. . . . *It shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to this chapter.* . . .

29 U.S.C. § 1140 (emphasis added).

The prototypical Section 510 claim arises when a termination is motivated by an employer's desire to prevent a petitioning employee's pension from vesting. *Ingersoll-Rand Company v. McClendon*, 498 U.S. 133, 143 (1990). This type of claim is often referred to as an interference claim. Additionally, Section 510 provides a remedy for individuals discriminated against because they have given information or testified in an inquiry or proceeding related to ERISA. *E.g.*, *Nicolaou v. Horizon Media, Inc.*, 402 F.3d 325 (2d Cir. 2005).

In her complaint, Petitioner does not allege that she was terminated for attempting to exercise her own rights under any ERISA-governed plan. *See generally*, Resp. App. 3-8. Nor does she claim that she was denied any benefits for which she was eligible. *Id.* The only part of Section 510 that could conceivably apply to Petitioner is the sentence barring the discharge of an employee for giving information or testifying in an inquiry or proceeding.

By its terms, Section 510 requires that an individual must have "given information" or "testified" (or is about to testify) in "any inquiry or proceeding relating to this chapter." 29 U.S.C. § 1140. Absent a clearly expressed legislative intention to the contrary, ERISA's statutory language must ordinarily be regarded as conclusive. *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 835 (1990) (quoting *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)); *see also Idahoan Fresh v. Advantage Produce, Inc.*, 157 F.3d 197, 202 (3d Cir.

1998) ("[w]here the statutory language is plain and unambiguous, further inquiry is not required, except in the extraordinary case where a literal reading of the language produces an absurd result.").

The Court of Appeals for the Third Circuit recognized the plain and unambiguous meaning of Section 510. The Court considered the term, "inquiry" to mean exactly what the term is commonly understood to mean. As that Court observed, "inquiry" is most easily defined as "[a] request for information," based on the definition of that word in *Black's Law Dictionary, 9th Edition*. Pet. App. 12a. The Court rejected Petitioner's argument that the interrogative word "inquiry" could be twisted in some way to mean the same as the declarative word, "statement." Pet. App. 12a. The Court of Appeals recognized that the word "inquiry" naturally encompassed only situations where one party makes a request for information from another party. Pet. App. 12a-13a.

The Court of Appeals for the Third Circuit also performed the same analysis with the meaning of the word "proceeding." Again, the Court recognized that "proceeding" is generally used in the English language to describe a formal process – initiated either through a lawsuit or an agency. Pet. App. 13a. To confirm the meaning of this common and basic word, the Court again turned to the same dictionary that lawyers and judges have used for years. Pet. App. 13a. The Court did not have to make any great leaps of logic, nor did it employ any kind of legal mysticism. The meaning of the words "proceeding" and "inquiry"

can be found in everyday use, and are not arcane relics from a dead language.

While recognizing that Petitioner and the Secretary of Labor wanted these words to have broader meaning in order to aid in the "liberal construction" of ERISA, the Third Circuit Court of Appeals recognized its Constitutional duty to stay within the parameters of Congress' choice of words. Pet. App. 14a. The Court did not ignore the recognized intent of ERISA to protect plan participants and, in fact, acknowledged ERISA's intent. Pet. App. 14a. However, the Court also recognized that Congress' choice of words left absolutely no uncertainty about Congress' intent. Pet. App. 14a. Had Congress intended Section 510 to encompass unsolicited, internal "statements" to management, Congress would have used appropriate words to manifest this desire. Pet. App. 14a-15. Because Congress left no ambiguity in its choice of words, the Court took Congress at its word (or choice of words in this case). Pet. App. 14a-15a.

By giving these words their usual and customary meaning, the Court of Appeals for the Third Circuit agreed with the holdings of the Courts of Appeals for the Fourth and Second Circuits. These two appellate courts are the only other Circuit Courts of Appeals to have analyzed the meaning of Section 510's anti-retaliation provision. In *King v. Marriott Intern. Inc.*, 337 F.3d 421, 428 (4th Cir. 2003), the Court of Appeals for the Fourth Circuit held that purely intra-company complaints did not bring a plaintiff within the ambit of Section 510 because such complaints did

not involve an official proceeding. *Id.* at 427-28. In *King*, the employee had worked in Marriott's benefits department for many years when she learned of Marriott's intent to transfer millions of dollars from its medical plan into its general corporate reserve. *Id.* at 423. King believed the transfer violated ERISA and expressed her concerns to co-workers, her supervisor (verbally and in writing) and to in-house attorneys. *Id.* She even went so far as to request an opinion letter from one of the in-house attorneys. *Id.*

Analyzing the facts of *King* in the context of Section 510, the Court of Appeals for the Fourth Circuit explained that the use of the word "testify" suggests that "inquiry or proceeding" requires something more than complaints to a supervisor. *Id.* at 427. The phrase "given information" is merely to protect a person's providing of non-testimonial information, but still in the context of an inquiry or proceeding. *Id.* at 427.

Like the Court of Appeals for the Third Circuit, the Fourth Circuit Court of Appeals reached this conclusion by looking at the plain meaning of the words contained in Section 510. Further, the Court of Appeals for the Fourth Circuit compared Section 510's language to other anti-retaliation provisions to highlight the dramatic difference between Congress' use of the words "inquiry" and "proceeding" in Section 510 as opposed to the anti-retaliation provisions in other statutes. As correctly recognized by the Fourth Circuit, the anti-retaliation provision in Section 510 is much narrower than the equivalent anti-retaliation

provision in Title VII. *Id.* at 427. Title VII broadly protects employees that have "opposed any practice made an unlawful employment practice by [Title VII]." 42 U.S.C. § 2000e-3(a). The Courts of Appeals for the Third and Fourth Circuits considered it significant that Congress would choose a much narrower wording for Section 510's anti-retaliation provision. Both Circuits easily reasoned that Congress did not wish to protect employees that simply stated their opinions about possible ERISA violations without being prompted by some form of formal inquiry or proceeding.

The Court of Appeals for the Second Circuit performed a similar analysis of the word, "inquiry." *Nicolaou v. Horizon Media, Inc.*, 402 F.3d 325, 330 (2d Cir. 2005). In that case, Chrystina Nicolaou worked as director of human resources and served as the fiduciary of Horizon's 401K plan. When Nicolaou discovered that the plan was underfunded, she immediately raised her concerns to the CFO, and on two later occasions with the Controller, neither of whom took any action in response. *Id.* at 326. Nicolaou then contacted the company's attorney. Subsequently, the company's attorney and Nicolaou bought the issue to the Company's president. *Id.*

The Court of Appeals for the Second Circuit analyzed whether these facts would qualify as an "inquiry" within the meaning of Section 510. *Id.* at 330. That Court, like the Courts of Appeals for the Third and Fourth Circuits, observed that the term,

"inquiry" as used in Section 510 of ERISA, contemplated some predicate request by another party. *Id.* at 329. The Second Circuit observed that the customary usage of the word "inquiry" is "the act or an instance of seeking truth, information, or knowledge about something" or "a request for information." *Id. quoting*, *Webster's Third New International Dictionary* 1167 (1993). This led the Court to conclude that, "[c]ertainly if Nicolaou can demonstrate that she was contacted to meet with [the President] in order to give information about the alleged underfunding of the Plan, her actions would fall within the protection of Section 510." *Id.* at 330. The Court noted that in Nicolaou's case, the meeting was initiated at the attorney's behest, therefore satisfying the plain language of Section 510's use of the term, "inquiry." *Id.*

Similar to the Courts of Appeals for the Third and Fourth Circuits, the Second Circuit also did not consider Congress' use of the terms, "inquiry" and "proceeding" to be superfluous. *Id. citing*, *TRW v. Andrews*, 534 U.S. 19, 31 (2001). The Court of Appeals for the Second Circuit considered it important that Congress inserted the term, "inquiry" into Section 510, but that term did not appear in the anti-retaliation provisions of the Fair Labor Standards Act. *Id.* at 329. Rather than overlook this important term as Petitioner would, the Second Circuit considered Congress' use of the term, "inquiry" in conjunction with the word, "proceeding" a strong indication to "'give the nouns the separate, normal meanings. . . .'"

Id. citing, *Garcia v. United States*, 469 U.S. 70, 73 (1984).

Based on the foregoing, there is no doubt that the Circuit Courts of Appeals which have analyzed the language of Section 510 have concluded that the customary definitions of the terms, "inquiry" and "proceeding" require something more than unsolicited, internal grievances in order to be protected under ERISA. The Courts of Appeals for the Fourth, Second, and now the Third Circuit simply looked at Congress' choice of words and applied those words. These Circuit Courts did not engage in unnecessary analysis or speculation over the meaning of the words because they are everyday words. Moreover, the Court of Appeals for the Third Circuit specifically gave consideration to ERISA's intent to protect employee benefit plans and whistleblowers, but noted that Congress' choice of words left virtually no room for doubt as to what Congress intended.

Here, the Petitioner desperately strives to urge interpretations that go beyond the meaning of the words Congress used in order to make the statute seem more reasonable and protective. As a result, she substitutes her judgment and reasoning for that of Congress. Even assuming *arguendo* that Petitioner has a noble and righteous view of how Section 510 ***should*** work, ERISA is a highly complex statute that is part of an intricate body of law. ERISA "imposes participation, funding, and vesting requirements" on pension plans, and sets uniform standards for "reporting, disclosure, and fiduciary responsibility" for

pension plans and employee benefit plans. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983). Fiduciaries have an obligation under ERISA to monitor plan compliance, investigate possible violations, and take remedial action. 29 U.S.C. §§ 1104(a)(1), 1105(a)(3), 1109(a). Even experienced labor attorneys and accountants struggle to understand these requirements. As a result, it makes perfect sense that Congress did not want to make individual employees, acting by themselves, the enforcement arm of such a complex statutory scheme. Giving special attention to every employee's personal interpretation of ERISA without help from others would lead to a plethora of suits for "enforcement of ERISA rights." Without some sort of formal investigation or proceeding by a plan fiduciary, a controller, or the Labor Department to determine the merits of the complainant's statement, this would make virtually every employee a purported expert on plan requirements at the complaint's outset. Given the complexities of ERISA it therefore makes perfect sense that Congress sought to limit ERISA's whistleblower protection to more formal instances where the employee has "testified or is about to testify in any inquiry or proceeding." 29 U.S.C. § 1140.

Petitioner also relies heavily on the argument that Section 510 must protect unsolicited internal complaints because a narrow interpretation would permit and encourage retaliatory terminations and discourage employees from reporting ERISA violations. Pet. Br. pp. 23-25. This argument works both ways because inquires and investigations are two-way

streets. Section 510's use of the words "inquiry" and "proceeding" shows that Congress envisioned situations whereby more than one party is at the table. In other words, Congress was not just thinking about complaining employees, but also the employer or plan fiduciaries. As stated, *supra*, fiduciaries have an obligation under ERISA to monitor plan compliance, investigate possible violations, and take remedial action. 29 U.S.C. §§ 1104(a)(1), 1105(a)(3), 1109(a). While Petitioner speculates that unscrupulous employers might short-circuit the investigation process by silencing complaints, equally unscrupulous employees might also cut off a fiduciary's investigation if every unsolicited gripe was protected. An employee could thwart the investigation process by filing a claim asserting whistleblower protection for simply raising a grievance. The employee would then have an incentive to refuse to participate in the investigation. Congress' use of the words, "inquiry" and "proceeding" manifests a desire for an employer to utilize investigations to determine potential ERISA violations. Had Congress intended to give only one party to that investigation protection, it would have used a phrase similar to what appears in Title VII – protecting only the employee who "opposes" discrimination, not the employer. 42 U.S.C. § 2000e-3(a). Petitioner's idea that Section 510 is designed to protect only employees at the expense of employers and plan fiduciaries is consequently without any merit.

Further, Congress is the only authority on drafting the complex body of anti-retaliation provisions.

This is not Congress' first anti-retaliation provision. Whistleblower provisions are not new legal concepts. Congress has drafted anti-retaliation provisions for over 40 years. Anti-retaliation provisions are often part of a more comprehensive and complex piece of legislation. Some brief examples of the many anti-retaliation provisions which Congress inserted into legislation over the years include:

- The Clean Air Act, 42 U.S.C. § 7622, granting protection to an employee that has:

  > (1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or a proceeding for the administration or enforcement of any requirement imposed under this chapter or under any applicable implementation plan,
  >
  > (2) testified or is about to testify in any such proceeding, or
  >
  > (3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purposes of this Act.

- The Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. § 9610, which protects an employee that:

  > has provided information to a State or to the Federal Government, filed, instituted, or caused to be filed or instituted any

proceeding under this chapter, or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter.

- The Consumer Product Safety Improvement Act of 2008, 15 U.S.C. § 219, which prevents an employer from taking action against an employee because the employee:

  (1) provided, caused to be provided, or is about to provide or cause to be provided to the employer, the Federal Government, or the attorney general of a State information relating to any violation of, or any act or omission the employee reasonably believes to be a violation of any provision of this Act or any other Act enforced by the Commission, or any order, rule, regulation, standard, or ban under any such Acts;

  (2) testified or is about to testify in a proceeding concerning such violation.

- The Energy Reorganization Act, 42 U.S.C. § 5851, protecting an employee that has:

  (A) notified his employer of an alleged violation of this chapter or the Atomic Energy Act of 1954 (42 U.S.C. § 2011, *et seq.*);

  (B) refused to engage in any practice made unlawful by this chapter or the Atomic Energy Act of 1954, if the

employee has identified the alleged illegality to the employer;

(C) testified before Congress or at any Federal or State proceeding regarding any provision (or proposed provision) of this chapter or the Atomic Energy Act of 1954;

(D) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or the Atomic Energy Act of 1954, as amended, or a proceeding for the administration or enforcement of any requirement imposed under this chapter or the Atomic Energy Act of 1954, as amended;

(E) testified or is about to testify in any such proceeding or;

(F) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of this chapter or the Atomic Energy Act of 1954, as amended.

- The Safe Water Drinking Act, 42 U.S.C. § 300j-9, which protects an employee that has:

(A) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this subchapter or a proceeding for

> the administration or enforcement of drinking water regulations or underground injection control programs of a State,
>
> (B) testified or is about to testify in any such proceeding, or
>
> (C) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purposes of this subchapter.

- The Toxic Substances Control Act, 15 U.S.C. § 2622, preventing an employer from retaliating against an employee that has:

  > (1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter;
  >
  > (2) testified or is about to testify in any such proceeding; or
  >
  > (3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purposes of this chapter.

With each of these aforementioned Acts, we must presume that Congress made careful and deliberate considerations about how these anti-retaliation provisions fit within the broader purpose of each of these Acts. Not all of these Acts give blanket protection to every internal grievance or voluntary complaint to

an employer. Some are broad while others are narrow. As with Section 510 of ERISA, Congress selected certain words in each of these statutes. For the Petitioner to assume that she is a better legislator than Congress ignores the long history and vast experience of Congress in implementing anti-retaliation provisions to further specific legislative goals. Even if Petitioner's desired statutory protection makes sense – even more sense than that chosen by Congress – only Congress, and not the courts or individual plaintiffs, formulate the law. Clearly, when Congress intends to protect unsolicited, internal complaints to further a piece of legislation, Congress knows what language to use. Given the many examples of anti-retaliation provisions in other statutes, Congress has many models to choose from.

As a result, the plain language of ERISA Section 510 can only be read to protect whistleblowers who have given information or have testified or are about to testify in any inquiry or proceeding. 29 U.S.C. § 1140. ERISA Section 510 cannot be read to protect an employee who submits a unilateral, unsolicited complaint or "opposes" an unlawful practice.

2. Petitioner overstates the analysis by the Fifth and the Ninth Circuit Courts of Appeals of Section 510 because those Circuit Courts have only analyzed Section 510 in the context of whether that Section preempts state law retaliation claims.

Petitioner argues that there is a split among the Circuits over the meaning of Section 510. She cites only two cases, and those cases have no real in-depth explication of Section 510, but rather have treated it only in a cursory manner: *Anderson v. Electronic Data Systems*, 11 F.3d 1311, 1314 (5th Cir. 1994) and *Hashimoto v. Bank of Hawaii*, 999 F.2d 408, 411 (9th Cir. 1993). Petitioner greatly overstates the holdings of these cases. Contrary to what Petitioner contends, the holdings of *Anderson* and *Hashimoto* do not present an analytical divide because neither the *Anderson* Court nor the *Hashimoto* Court addressed the meaning of Section 510's language in question here.

In 1993, the Ninth Circuit Court of Appeals addressed whether Section 510 of ERISA preempted plaintiff Jessica Hashimoto's claims of retaliation in violation of Hawaii's Whistle Blower's Protection Act (Haw. Rev. Stat. §§ 378-61, *et seq.*). *Hashimoto v. Bank of Hawaii*, 999 F.2d 408, 409 (9th Cir. 1993). In that case, Hashimoto claimed that she complained to two employees about an improper reimbursement from a profit-sharing plan and an improper benefit calculation. *Id.* Hashimoto alleged that several times

over an 18-month period she complained about these actions, which she considered to be potential or actual ERISA violations. *Id.* Hashimoto contended that she would not have been fired "but for" her complaints. *Id.*

The Court of Appeals for the Ninth Circuit surveyed the state of the law. Contrary to Petitioner's contention, the body of law that the Court addressed was not ERISA, but preemption. *Id.* at 411. The Court simply concluded that because ERISA contained the anti-retaliation provision set forth in Section 510, Hashimoto's claims under Hawaii's Whistle Blower's Protection Act were totally preempted. *Id.* at 411-12. Importantly, the Ninth Circuit did not examine whether Hashimoto's facts set forth a plausible claim for relief under Section 510 – only the extent of whether Section 510 preempted a state whistleblower cause of action. *Id.* The Court specifically avoided the analysis of the words, "inquiry," and "proceeding," to conclude in a perfunctory fashion that Section 510 was "meant to protect whistleblowers." *Id.* All that it did was determine whether a claim of the nature of Hashimoto's was contemplated by Section 510; it specifically did not determine whether her particular facts stated a claim under Section 510. The Ninth Circuit Court of Appeals most likely decided not to focus much attention on the actual language of Section 510, because that issue was not before the Court. The only issue before the Court was whether ERISA's Section 510 preempted an identical state law claim. Alternatively, as the Court of Appeals for the Fourth

Circuit observed, the dicta in the Ninth Circuit's decision about Section 510 could be results driven. *King*, 337 F.3d at 428 fn 4. In fact, when reading the *Hashimoto* decision, the Ninth Circuit's holding that Section 510 was simply, "meant to protect whistleblowers" is a truism that bears little weight.

The fact that Section 510 was designed to protect whistleblowers and preempted a similar state law is a long way from finding that Hashimoto herself was a whistleblower. The fact that a claim is preempted by federal law does not mean that the claim is a valid one; it merely means that federal law regulates the area of rights and remedies. *E.g.*, *Good v. Altria Group, Inc.*, 501 F.3d 29, 46 (1st Cir. 2007) (explaining that Courts do not examine the underlying merits of a plaintiff's claim in a preemption analysis) *citing Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 524 (1992); *Price v. Phillip Morris, Inc.*, 219 Ill.2d 182, 848 N.E.2d 1, 36-37 (2005); *Mulford v. Altria Group, Inc.*, 506 F.Supp.2d 733, 751-52 (D.N.M. 2007) ("Courts do not determine whether a plaintiff can succeed on the merits of the fraud claim before determining whether the fraud claim itself is preempted."). By way of analogy, if federal speeding laws preempted state speeding laws and the issue in *Hashimoto* involved speeding, Hashimoto's case was preempted because it dealt with speeding. The fact that the case is subject to preemption does not answer the question of whether Hashimoto was in fact speeding. In *Hashimoto*, the question of whether an accusation of retaliation for reporting an ERISA claim

was preempted by federal law does not answer the substantive question of whether Petitioner Edwards' particular conduct was protected by ERISA Section 510. In *Hashimoto*, the Court of Appeals for the Ninth Circuit analyzed Section 510 only far enough to determine whether Hashimoto's claim was the sort of claim that the statute addressed; not whether she stated a substantive claim upon which relief might be granted. *Hashimoto*, 999 F.2d at 411-12. Therefore, when compared against the Courts of Appeals for the Second, Third, and Fourth Circuits' detailed analysis of Section 510's language, the Ninth Circuit's conclusion in *Hashimoto* bears little weight.

In 1994 the Court of Appeals for the Fifth Circuit examined Section 510 to determine whether ERISA preempted a state wrongful discharge claim. *Anderson v. Electronic Data Systems*, 11 F.3d 1311, 1314 (5th Cir. 1994). In that case, plaintiff George Raymond Anderson claimed that he was terminated for refusing to commit ERISA violations and for reporting potential ERISA violations to management. *Id.* at 1313. Anderson filed a claim for wrongful discharge pursuant to Texas state law, not pursuant to Section 510 of ERISA. *Id.* Defendant removed the claim to Federal District Court. *Id.* After the District Court dismissed Anderson's claim, Anderson appealed and asserted that the District Court lacked jurisdiction over his state law wrongful discharge claim. *Id.* The Fifth Circuit analyzed "whether the claims asserted by Anderson are preempted by ERISA." *Id.* After an extensive review of this Court's precedent, the Fifth

Circuit held that Anderson's wrongful discharge claim was preempted by ERISA. *Id.* at 1314.

As with the Ninth Circuit's *Hashimoto* decision, the Court of Appeals for the Fifth Circuit did not analyze the substantive language of Section 510 to determine if Anderson had presented a viable claim. *Id.* The Court did not address the facts of Anderson's claim. It did not hold that Anderson had shown that his complaints were in response to an "inquiry" as part of some "proceeding." In fact, the Fifth Circuit Court of Appeals specifically noted that its holding "does not hinge on whether ERISA provides the remedy the plaintiff seeks or any remedy at all for the alleged wrong." *Id.* In a footnote, the Court cited to *Corcoran v. United Healthcare, Inc.*, 965 F.2d 1321, 1333 (5th Cir.), *cert. denied*, 505 U.S. 1033 (1992) and explained that the lack of an ERISA remedy does not affect a preemption analysis. *Id.* at fn 4. Clearly, the Court's holding in *Anderson* deliberately avoided any analysis of whether unsolicited complaints are covered by Section 510 of ERISA and instead focused only on whether ERISA preempted a state law wrongful discharge claim.

Petitioner erroneously considers both *Hashimoto* and *Anderson* to stand for the proposition that Section 510 of ERISA protects unsolicited internal complaints. Pet. pp. 8-10. As shown, *supra*, there is no basis for this conclusion. The cases provide no substantive analysis of Section 510. Petitioner avoids the actual holdings of both *Hashimoto* and *Anderson* with respect to the preemption issues and cites to these

cases as proof of a "longstanding and growing circuit conflict," that will produce inconsistent results and forum shopping. Pet. pp. 14, 17. Yet neither of these cases are evidence of a Circuit split because only the Courts of Appeals for the Second, Third, and Fourth Circuits have actually addressed the substance of Section 510. *Hashimoto* and *Anderson* provide no basis for Petitioner's conclusion that the Ninth and Fifth Circuits are split from the Second, Third and Fourth Circuits. Indeed, the holdings from *Hashimoto* and *Anderson* only go to preemption, not Section 510's substance.

Accordingly, there is no split between the Circuits. The only Circuits to have addressed the scope of Section 510 are all in agreement. The holdings of the Ninth and the Fifth Circuits in *Hashimoto* and *Anderson* respectively, do not show a pervasive conflict between the Circuits.

B. Even if there is a true split between the Circuits, this is a poor vehicle for analyzing Section 510 given Petitioner's skeletal allegations about unsolicited, internal grievances.

A proper petition for certiorari should address issues of important fact or critical concerns. However, this case would not allow the Court to consider what type of activity constitutes protected activity under ERISA's anti-retaliation provision. Petitioner has barely alleged any facts about her protected conduct

for this Court to consider. Consequently, any decision by this Court on the issue would be limited to such nebulous and theoretical facts that this is not an ideal case for examining the scope of ERISA Section 510's language.

Petitioner vaguely claims in her Complaint that she objected to and/or complained to Respondent's management about violations of ERISA, including but not limited to, the discriminatory basis in which Respondents were awarding ERISA benefits and Respondents' action of permitting non-qualifying ERISA applicants to participate in Respondent's group health plan. Resp. App. 7-8. Petitioner also claims that she objected to and/or complained to Respondents' management and owners about intentionally misleading employees about group health plan information. Resp. App. 8. These are literally the extent of the facts set forth in Petitioner's complaint about Petitioner's protected activity. Resp. App. 7-8.

This kind of pleading is simply a formulaic recitation of legal elements that does not meet the basic fact-pleading standard set forth by this Court. In *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), this Court held that a pleading which contained only "labels and conclusions" or a "formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555. Subsequently, this Court extended the reach of *Twombly*, instructing that all civil complaints must contain "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, ___ U.S. ___, 129 S.Ct.

1937, 1949 (2009). Legal conclusions can provide the framework of a complaint, but they must be supported by factual allegations. *Iqbal*, 129 S.Ct. at 1950. In analyzing the sufficiency of any complaint, a District Court must first separate the facts from the legal conclusions and then determine whether the facts alleged in the complaint are sufficient to show that the plaintiff has a "plausible claim for relief." *Id.* 1949-50. This "plausibility" determination will be a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.*

Using *Iqbal* as a guide, Petitioner's Complaint contains such a paucity of facts that not only is the pleading insufficient as a matter of law; it is entirely deficient for purposes of a writ of certiorari. Petitioner did not allege when she voiced her concerns or to whom. Petitioner has not provided the "who, what, where, and when," surrounding her complaints, let alone give this Court something substantive to consider in regards to certiorari. Did Petitioner leave a note on a desk? Did Petitioner ask for a meeting? Did Petitioner voice her concerns in an email or text message? Did Petitioner leave a voice mail message with Respondent Scott Cornell? Did the Petitioner have a passing conversation about her concerns at an office birthday party? Such omissions are telling, especially in light of the fact that Petitioner did not hesitate to name names when identifying Melissa Closterman and Scott Cornell as individual defendants

for their participation in communicating the fact of her termination. Resp. App. 3.

If this Court were to grant a writ of certiorari, there would be nothing for the Court or future litigants to consider. The Court would be issuing a decision with potentially broad implications, but with absolutely no facts for future guidance. Certainly, if Section 510's language needs clarification from this Court, even a case with a few bare facts about how the Petitioner complained about ERISA violations would be better than the instant case. Accordingly, the Court should deny the petition for a writ of certiorari.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

SHIRLEY EDWARDS 3100 Knights Way Doylestown, PA 18902 Plaintiff, v. A.H. CORNELL AND SON, INC., d/b/a AH CORNELLS 2362 York Road Jamison, PA 18929 and MELISSA J. CLOSTERMAN 2362 York Road Jamison, PA 18929 and SCOTT A. CORNELL 2362 York Road Jamison, PA 18929 Defendants.	CIVIL ACTION No. 09-1184 **JURY TRIAL DEMANDED**

FIRST AMENDED CIVIL ACTION COMPLAINT

Plaintiff Shirley Edwards (hereinafter referred to as "Plaintiff" unless otherwise indicated) hereby complains as follows against Defendants:

INTRODUCTION

1. Plaintiff has initiated this action to redress violations by Defendants of the Employee Retirement Income Security Act ("ERISA") and various state laws. As a result of Defendants' unlawful actions, Plaintiff suffered the damages set forth herein.

JURISDICTION AND VENUE

2. This Court, in accordance with 28 U.S.C. 1331, has jurisdiction over Plaintiff's claims, which assert violations of ERISA, as set forth herein, because this civil action arises under a law of the United States. This Court has supplemental jurisdiction over Plaintiff's state-law claims because they arise of the same nucleus of operative facts as those set forth in Plaintiff's federal claims.

3. This Court may properly maintain personal jurisdiction over Defendants because Defendants' contacts with this state and this judicial district are sufficient for the exercise of jurisdiction over Defendants to comply with traditional notions of fair play and substantial justice, satisfying the standard set forth by the United States Supreme Court in *International Shoe Co. v. Washington,* 326 U.S. 310 (1945) and its progeny.

4. Pursuant to 28 U.S.C. § 1391(b)(1) and (b)(2), venue is properly laid in this district because all of the acts and/or omissions giving rise to the claims set forth herein occurred in this judicial district and

Defendants are deemed to reside where they are subject to personal jurisdiction, rendering Defendants residents of the Eastern District of Pennsylvania.

PARTIES

5. The foregoing paragraphs are incorporated herein in their entirety as if set forth in full.

6. Plaintiff is an adult individual, with an address as set forth in the caption.

7. Defendant A.H. Cornell and Son, Inc. (hereinafter "Defendant AHC"), upon information and belief, is a Pennsylvania entity that engages in the business of performing contracting and construction services, such as excavation, paving, snow removal, recycling, and other commercial and residential construction projects.

8. Defendant Melissa J. Closterman (hereinafter "Defendant Closterman") manages and/or oversees daily operations within Defendant AHC, and all times relevant herein, directed Plaintiff in her employment and was directly responsible for terminating Plaintiff.

9. Defendant Scott A. Cornell (hereinafter "Defendant Cornell") is an executive of Defendant AHC and was responsible for overseeing the terms and conditions of Plaintiff's employment, and he participated in the termination of Plaintiff's employment.

10. At all times relevant herein, Defendants acted by and through their agents, servants and employees, all of whom acted at all times relevant herein in the course and scope of their employment with and for Defendants.

FACTUAL BACKGROUND

11. The foregoing paragraphs are incorporated herein in their entirety as if set forth in full.

12. Defendant AHC is a company that consists of approximately 55-65 employees.

13. Plaintiff was hired in or about March of 2006.

14. Before hiring Plaintiff, Defendants did not have any full-time dedicated human resources personnel.

15. Defendants hired Plaintiff to establish a human resources department.

16. Plaintiff had a very significant human resources background and worked for Defendants for approximately 3 years until in or about February 11, 2009.

17. During Plaintiff's tenure with Defendants, she learned that Defendant Closterman was engaging in unlawful acts, and Defendant Closterman requested that Plaintiff participate in acts that were unlawful during Plaintiff's employment with Defendants.

18. In the last several weeks of her employment, Plaintiff learned that Defendants were committing fraud upon their worker's compensation insurance carrier and their disability insurance carrier.

19. For example, Plaintiff learned that an employee actually returned to work with Defendants after sustaining a work-related injury; that while the employee was working, he was still collecting worker's compensation insurance for being out of work; and that this employee had used a false social security number and information to obtain worker's compensation insurance in the first place.

20. Plaintiff was specifically directed by Defendant Closterman to make false statements to Defendants' worker's compensation carrier and to give incorrect and false information about the particular employee who was working while collecting benefits and who was also using a false social security number.

21. Plaintiff was also directed in the last several weeks of her employment by Defendant Closterman to provide false information to a disability insurance carrier for Defendants, including but not limited to, providing the disability insurance carrier with a false name for the disability insurance applicant then residing in Mexico (who, upon information and belief, was not a properly documented non-citizen employee of Defendants).

22. Plaintiff objected to committing criminal fraud upon two (2) separate insurance carriers of Defendant within the 2 weeks before she was terminated from Defendants.

23. Defendants also had a group health insurance plan, governed by ERISA, which Plaintiff learned was being administered illegally within Defendant and on a discriminatory basis.

24. Defendants were obligated to offer employees the benefits of its group health plan equally and on a non-discriminatory basis.

25. Plaintiff learned however that many employees were being lied to about what their actual contributions would be by Defendant Closterman in an effort to dissuade employees from opting into the benefits and that certain employees were not even being offered health benefits at all – all in violation of ERISA-qualifying group health plan requirements.

26. Defendants, through Defendant Closterman, were also withholding and concealing required group plan information from employees of Defendants.

27. Not only was Defendant Closterman unlawfully discriminating against applicants in a group health plan and making intentional misrepresentations to employees and applicants of Defendants, Defendant Closterman was also unlawfully enrolling non-citizens in the ERISA-qualifying life, disability and/or group health plan.

28. To accomplish Defendants' unlawful objectives of enrolling non-citizens falsely in Defendants' ERISA health plan, Defendants terminated their representation of an insurance broker and hired someone whom Defendants' knew personally, who in turn, upon information and belief, enrolled non-citizens through false and unlawful pretenses.

29. Plaintiff objected to participating in a scheme to commit criminal fraud as to Defendants' disability insurance carrier, worker's compensation insurance carrier, and health insurance carrier.

30. The fraud that Plaintiff was directed to commit and/or to participate in as set forth herein all occurred in close proximity to Plaintiff's termination.

31. Plaintiff also learned of many other unlawful activities within Defendant, which were knowing and intentional, all of which will demonstrate that Defendant's actions herein were willful and outrageous.

Count I
Violations of ERISA – Section 510,
29 U.S.C. § 1140
(Retaliation)
– Against All Defendants –

32. The foregoing paragraphs are incorporated herein in their entirety as if set forth in full.

33. Plaintiff objected to and/or complained to Defendants' management about violations of ERISA,

including but not limited to, the discriminatory basis in which Defendants were awarding ERISA benefits and Defendants' actions of permitting non-qualifying ERISA applicants to participate in Defendants group health plan.

34. At the time of Plaintiff's termination, she was enrolled in Defendants' group life insurance and disability insurance plans, and therefore received benefits and/or might have become eligible to receive benefits under these plans.

35. In addition, at the time of her termination, Plaintiff was eligible to enroll in Defendant's group health insurance plan, and thus may have become eligible to receive benefits under this plan.

36. Defendants' group health insurance plan, life insurance plan, and disability insurance plan are governed by ERISA.

37. Plaintiff is therefore a "participant" under ERISA pursuant to 29 U.S.C. § 1002(7).

38. Plaintiff also objected to and/or complained to Defendants' management and owners about intentionally misleading employees about group health plan information.

39. Upon information and belief, a motivating factor in Plaintiff's termination was her aforesaid inquires objections, opposition, and/or complaints about ERISA violations.

40. Plaintiff's termination for engaging in protected activity therefore constitutes a violation of ERISA, Section 510.

Count II
Common-Law Wrongful Discharge
(Against Defendant AHC Only)

41. The foregoing paragraphs are incorporated herein in their entirety as if set forth in full.

42. Plaintiff was terminated for failing to commit criminal acts, including but not limited to:

i. Insurance Fraud – 18 Pa.C.S. §4117;

ii. Theft by Deception – 18 Pa.C.S.A. § 3922;

iii. Deceptive Business Practices – 18 Pa.C.S.A. § 4107;

iv. Criminal Conspiracy – 18 Pa.C.S.A. § 903;

v. Falsification of Social Security Information – 42 U.S.C.A. § 408; and

vi. Use of and/or Harboring of Unauthorized Employees – 8 U.S.C.A. § 1324

43. The above criminal actions are not intended to be an all-inclusive list of crimes that Defendants were engaged in and/or attempting to commit. Rather, they comprise only some of the crimes that Defendants committed and some of the crimes that Plaintiff objected to and/or refused to participate in while in the employ of Defendants.

44. Defendants' termination of Plaintiff for refusing to commit unlawful actions under state and federal law(s) constitutes a violation of public policy within Pennsylvania.

WHEREFORE, Plaintiff prays that this Court enter an Order providing that:

A. Defendants are to be prohibited from continuing to maintain their illegal policies, practices or customs against employees or prospective employees and are to be ordered to promulgate an effective policy against such retaliation and discrimination and to adhere thereto;

B. Defendants are to compensate Plaintiff, reimburse Plaintiff and make Plaintiff whole for any and all pay and benefits Plaintiff would have received had it not been for Defendants' illegal actions, including but not limited to past lost earnings, future lost earnings, salary, pay increases, bonuses, medical and other benefits, training, promotions, pension, and seniority. Plaintiff should be accorded those benefits illegally withheld (if determined that there are such benefits) from the date she first suffered retaliation at the hands of Defendants until the date of verdict;

C. Plaintiff is to be awarded liquidated damages or punitive damages as permitted by any of her claims herein, in an amount believed by the Court or trier of fact to be appropriate to punish Defendants for their willful, deliberate, malicious and outrageous conduct and to deter Defendants or other employers from engaging in such misconduct in the future;

D. Plaintiff is to be accorded any and all other equitable and legal relief as the Court deems just, proper and appropriate;

E. Plaintiff is to be awarded the costs and expenses of this action and reasonable legal fees as provided by applicable federal and state law;

F. Any verdict in favor of Plaintiff is to be molded by the Court to maximize the financial recovery available to Plaintiff in light of the caps on certain damages set forth in applicable federal law;

G. Plaintiff's claims are to receive a trial by jury to the extent allowed by applicable law. Plaintiff has also endorsed this demand on the caption of this Complaint in accordance with Federal Rule of Civil Procedure 38(b).

Respectfully submitted,

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Dated: June 1, 2009

No. 10-732

IN THE

Supreme Court of the United States

SHIRLEY EDWARDS,

Petitioner,

v.

A.H. CORNELL AND SON, INC., D/B/A AH CORNELLS; MELISSA CLOSTERMAN; SCOTT A. CORNELL,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

The Third Circuit acknowledged below that the "federal Courts of Appeals are split on whether [ERISA] Section 510 encompasses unsolicited internal complaints." Pet. App. 7a. Respondents do not dispute that this question is recurring and important and requires a nationally uniform answer. *See* Pet. 14-16; AARP Amicus Br. 4-6. Respondents insist, however, that this Court should not provide that answer in this case because the Third Circuit was wrong in discerning a circuit conflict, BIO 21-26, because this case presents a poor vehicle for resolving any conflict that may exist, BIO 28, and because the court of appeals correctly resolved the question for the three states in the Third Circuit, BIO 6-20. None of these objections has any merit or provides a reason to deny certiorari.

I. The Circuits Are Divided Over Whether ERISA Section 510 Applies To Unsolicited Internal Complaints, With Consequences In Two Important Legal Contexts.

Respondents insist that the Third Circuit was wrong in concluding (Pet. App. 7a, 14a) that its holding in this case conflicts with the Fifth Circuit's decision in *Anderson v. Electronic Data Systems Corp.*, 11 F.3d 1311 (5th Cir. 1994), and the Ninth Circuit's decision in *Hashimoto v. Bank of Hawaii*, 999 F.2d 408 (1993). Those cases, respondents insist, addressed only "whether Section 510 preempted a state whistleblower cause of action." BIO 22. And answering that question, respondents argue, did not require the courts to decide whether Section 510 provided a cause of action for unsolicited internal

complaints. BIO 23, 25. Respondents are simply wrong – both cases were required to, and did, decide the question presented by this petition.

1. First, there can be no question that both decisions construed ERISA to protect unsolicited internal complaints. After describing how Hashimoto was fired for raising an unsolicited complaint to company management, 999 F.2d at 409-10, the Ninth Circuit held that Section 510 "may be fairly construed to protect a person in Hashimoto's position if, in fact, she was fired because she was protesting a violation of law in connection with an ERISA plan," *id.* at 411. The court directly rejected any suggestion that Hashimoto was unprotected because she complained internally and unilaterally, explaining that the "normal first step in giving information . . . in any way that might tempt an employer to discharge one would be to present the problem first to the responsible managers of the ERISA plan." *Id.*

The Third Circuit was also right to observe that "the Fifth Circuit arrived at the same conclusion in *Anderson*." Pet. App. 8a. There, as in *Hashimoto*, the plaintiff was terminated after complaining of ERISA violations to company management. 11 F.3d at 1312-13. Although the complaints were unsolicited and made solely within the company, the Fifth Circuit "h[e]ld that Anderson's claim of demotion and termination for failing to commit acts in violation of ERISA and reporting such violations falls within the scope of the civil enforcement provisions of ERISA." *Id.* at 1315.

Respondents criticize both decisions as poorly reasoned, BIO 25, but they cannot dispute that those cases construed Section 510 in direct conflict with the

interpretations given the same provision by the Second, Third, and Fourth Circuits. *See* Pet. 8-14.

2. Respondents nonetheless argue that the Fifth and Ninth Circuits' construction of Section 510 was dicta because "[b]oth cases addressed only whether ERISA preempts analogous state law whistleblower complaints," not whether ERISA itself provides a remedy. BIO 2. Respondents are wrong again, their error stemming from a "failure to distinguish clearly between the concepts of 'ordinary' and 'complete' preemption," *McClelland v. Gronwaldt*, 155 F.3d 507, 515 (5th Cir. 1998). *See* Pet. 8 n.1.

Respondents' confusion of the two doctrines is particularly puzzling because the difference was explained with great clarity in one of the principal cases upon which they rely – the Fourth Circuit's decision in *King v. Marriott International, Inc.*, 337 F.3d 421 (4th Cir. 2003). In that case, the Fourth Circuit – like the Fifth Circuit in *Anderson* and the Ninth Circuit in *Hashimoto* – considered whether state law retaliation claims were properly removed to federal court.[1] The Fourth Circuit explained that "a defendant's raising of the defense of federal preemption is, under the well-pleaded complaint rule, insufficient to allow the removal of the case to federal court." *Id.* at 424. Nonetheless, "in some cases, federal law so completely sweeps away state law that any action purportedly brought under state law is transformed into a federal action that can be brought

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[1] *See Anderson*, 11 F.3d at 1312-13; *Hashimoto*, 999 F.2d at 409-10; *King*, 337 F.3d at 422-23.

originally in, or removed to, federal court." *Id.* at 425. "The operation of this rule has come to be known as the doctrine of 'complete preemption.'" *Id.*

The tests for ordinary and complete preemption are significantly different. While the "absence of a federal cause of action says nothing about whether a state law claim is preempted in the ordinary sense," a "vital feature of complete preemption is the existence of a federal cause of action that replaces the preempted state cause of action." *King*, 337 F.3d at 425. "Where no discernable federal cause of action exists on a plaintiff's claim, there is no complete preemption, for in such cases there is no federal cause of action that Congress intended to be the exclusive remedy for the alleged wrong." *Id.* (emphasis added).

Accordingly, contrary to respondents' central premise, a court *must* decide "whether ERISA provides a cause of action for the wrongs alleged" by the plaintiff in order to determine whether a state retaliation claim is completely preempted by ERISA and therefore removable to federal court. *King*, 337 F.3d at 426; *see also, e.g.*, *Aetna Health Inc. v. Davila*, 542 U.S. 200, 210 (2004) (complete preemption arises when the plaintiff "could have brought his claim under ERISA").[2]

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[2] *See further Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 66 (1987) ("Congress has clearly manifested an intent to make causes of action *within the scope of the civil enforcement provisions of [ERISA]* removable to federal court.") (emphasis added); *Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation*

2. Respondents are only too happy to embrace the Fourth Circuit's complete preemption holding in *King* as establishing binding precedent on the scope of Section 510. BIO 9-11. But that court faced the same question decided by the Fifth and Ninth Circuits in *Anderson* and *Hashimoto*. In all three cases, the courts of appeals were required to decide whether removed state retaliation claims were completely preempted and therefore properly resolved in federal court.[3]

The Fifth and Ninth Circuits, like the Fourth, recognize that a claim is completely preempted only if ERISA provides a substitute cause of action. Thus, while the court in *Anderson* noted that ordinary preemption "does not hinge on whether ERISA provides the remedy the plaintiff seeks or any remedy at all for the alleged wrong," BIO 25 (quoting *Anderson*, 11 F.3d at 1314), it also stressed that "finding that a claim is preempted does not end our analysis, since preemption is raised as a defense" and defenses do not provide a basis for removal. *Id.* at 1315. Instead, the Fifth Circuit recognized, "causes of action *within the scope of the civil enforcement provisions* of ERISA § 502(a) are subject to the complete preemption doctrine and removable to federal court." *Id.* (emphasis added). *See also, e.g.*, *McClelland*, 155 F.3d at 518 (finding no complete preemption where the plaintiff did not "assert a claim

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Trust for S. Cal., 463 U.S. 1, 26 (1983) (no complete preemption where "ERISA does not provide an alternative cause of action").

[3] *See Anderson*, 11 F.3d at 1313; *Hashimoto*, 999 F.2d at 412; *King*, 337 F.3d at 423.

that falls within any of the causes of action provided by" ERISA's enforcement provision).

The Ninth Circuit applied the same analysis in *Hashimoto*. There, the court of appeals agreed with the district court that the removed state law claims were preempted by ERISA. 999 F.2d at 411. But it went on to affirm that the district court had jurisdiction over the claims, relying on this Court's complete preemption decision in *Metropolitan Life Insurance Company v. Taylor*, 481 U.S. 58, 66-67 (1987). *See Hashimoto*, 999 F.2d at 412. Having found that "ERISA itself provides a remedy" for the plaintiff's claims, *id.* at 411, the court "remand[ed] for trial on this basis," *id.* at 409 – *i.e.*, on the basis of the plaintiff's properly recharacterized ERISA Section 510 claim. If the Ninth Circuit had decided only "whether Section 510 preempted a state whistleblower cause of action," as respondents assert (BIO 22), it would have been compelled to order the case remanded to state court.[4] Nor would it have ordered a trial on the merits if it had not concluded that the plaintiff stated a claim under Section 510.

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[4] *See, e.g., Toumajian v. Frailey*, 135 F.3d 648, 654 (9th Cir. 1998) ("Only if the complaint asserts a state law claim that can be reasonably characterized as a claim under any of ERISA's civil enforcement provisions can the action be properly removed."); *Harris v. Provident Life & Accident Ins. Co.*, 26 F.3d 930, 934 (9th Cir. 1994) (explaining that "it would be contradictory to rule that state law claims are [completely] preempted where the court has already held that the same plaintiffs may not assert a claim under ERISA") (citation omitted).

3. As the foregoing demonstrates, the proper scope of ERISA's anti-retaliation provision arises in two different, but important, contexts – challenges to the merits of a claim asserted directly under ERISA and objections to a defendant's attempt to remove parallel state law retaliation claims to federal court. Rather than provide a basis to deny certiorari in this case, the dual consequences of the present circuit conflict over the meaning of Section 510 amplify the need for this Court's intervention. At present, otherwise identical retaliation claims may or may not be removed to federal court, and may or may not succeed under ERISA, depending on the circuit in which the case is heard. The orderly adjudication, and the correct resolution, of such claims demands a nationally uniform interpretation Section 510. And given the entrenched, considered, and enduring disagreement among the lower courts, only this Court can provide that uniformity.

II. This Case Presents An Appropriate Vehicle For Resolving The Circuit Conflict.

Respondents' vehicle objections require little response. The circuits are divided over the legal consequences of two facts in Section 510 cases – the fact that the employee's complaint was unsolicited and the fact that it was made solely within the defendant company. Respondents allege no ambiguity in petitioner's allegations on those two points, nor could they. *See* Complaint ¶¶ 22, 29, 33,

38.[5] Instead, respondents complain that petitioner has not provided various other details that had no bearing on the court of appeals' decision below and have no relevance to the question presented for this Court's decision. *See* BIO 28.

Those objections – which could be reasserted on remand from this Court – are meritless in any event.[6] The complaint sets out in detail the substance of the alleged ERISA violations (Complaint ¶¶ 18-28), to whom petitioner complained ("Defendants' management and owners," *id.* ¶ 38, which includes management respondents Closterman and Cornell, *id.* ¶¶ 8-9), and when she made the complaints ("within the 2 weeks before she was terminated," *id.* ¶ 22; *see also id.* ¶¶ 18, 21, 30). Nothing in Section 510 or this Court's pleading decisions requires anything more.

III. Respondents' Defense Of The Third Circuit's Decision On The Merits Provides No Basis To Deny Review To Resolve The Circuit Conflict.

Finally, respondents' assertion that the decision below is correct provides no ground to leave the long-

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[5] The complaint is reproduced as an appendix to the brief in opposition.

[6] Respondents' objections to the specificity of the complaint would not provide an alternative ground for affirming the Third Circuit's dismissal of petitioner's complaint with prejudice. *See, e.g., Phillips v. County of Allegheny*, 515 F.3d 224, 228 (3d Cir. 2008) ("[I]n the event a complaint fails to state a claim, unless amendment would be futile, the District Court must give a plaintiff the opportunity to amend her complaint.").

standing circuit conflict unresolved and is unconvincing in any event.

1. Respondents largely repeat without further elaboration the textual analysis adopted by the Third Circuit below. BIO 6-13. Petitioner has already addressed those arguments in her petition. Pet. 18-23. A few points, however, are worth emphasizing again.

Although respondents embrace the conclusion that an "inquiry" must entail a formal proceeding, BIO 10, they ignore that the word "proceeding" is already in the statute and implies a formality that "inquiry," in common usage, does not. *See* Pet. 18-20. Moreover, respondents' insistence that "the word 'inquiry' naturally encompass[es] only situations where one party makes a request for information from another party," BIO 8, is entirely consistent with petitioner's argument that Section 510 protects a worker who inquires of her employer whether a company practice might violate the law. *See* Pet. 20-21.

Respondents likewise simply ignore this Court's decision in *NLRB v. Scrivener*, 405 U.S. 117 (1972), which teaches that a statute protecting employees from retaliation for participation in a formal proceeding should be construed to encompass preliminary activities as well, including making statements that should prompt initiation of the proceeding (in *Scrivener*, a government hearing; in this case, an internal company inquiry).

To be sure, Congress could have used clearer language, as respondents observe. BIO 15 (pointing to Title VII's anti-retaliation provision). But

respondents then immediately undermine their own point by cataloging a number of other statutes that limit protection to workers participating in formal external proceedings, using language markedly narrower than that of Section 510. For example, respondents quote the anti-retaliation provision of the Clean Water Act, 42 U.S.C. § 7622, which applies only to "proceedings" and makes no mention of "inquiries." Likewise, respondents quote a provision of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9610, which prohibits retaliation for giving "information" only if the information is "provided . . . to a State or to the Federal Government." Such provisions suggest that when "Congress intends to [exclude] unsolicited, internal complaints . . . Congress knows what language to use." BIO 20.

2. In reality, it is likely impossible to completely reconcile the various formulations Congress has used in different anti-retaliation provisions.[7] The focus ultimately must be on the best understanding of the language Congress used in any particular provision, in light of the statute's language and purposes, and basic common sense.

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[7] For that reason, this Court's impending decision in *Kasten v. Saint-Gobain Performance Plastics Corp.*, No. 09-834, addressing the scope of the Fair Labor Standard Act's anti-retaliation provision, 29 U.S.C. § 215(a)(3), will not affect the circuit conflict in this case. That provision – which protects an employee who "has filed [a] complaint" – is textually much more limited than ERISA's protection of workers who have "given information . . . in any inquiry," 29 U.S.C. § 1140.

As discussed above, the language of Section 510 does not compel the court of appeals' narrow reading. And as described in the petition, the court of appeals' construction is incompatible with the general purposes of the statute and draws a line between protected and unprotected conduct that makes little practical sense and would be difficult to administer in practice. Pet. 22-25.

To their credit, respondents do not deny the untoward consequences of the Third Circuit's interpretation. They do not contest, for example, that if an "inquiry" excludes unsolicited complaints, ERISA necessarily allows an employer to terminate a worker for filing a complaint with the Department of Labor. *See* Pet. 22. Nor do respondents deny that under their view of the statute, protection turns on whether the company fired the worker for making an initial complaint or, instead, for answering a follow-up question, a kind of distinction this Court rejected as "freakish" just last Term. *Crawford v. Metro. Gov't of Nashville & Davidson County, Tenn.*, 129 S. Ct. 846, 851 (2009).

Respondents nonetheless insist that Congress intended precisely that result in order to protect employers from "unscrupulous employees," BIO 15, and prevent individual workers from acting as "the enforcement arm of such a complex statutory regime," BIO 14. This hypothesized legislative intent is belied by the text of the statute itself. Respondents themselves acknowledge that the statute expressly *requires* employee-fiduciaries to monitor plan compliance with federal law and take action in response to suspected violations. BIO 15. Yet respondents' interpretation of Section 510 permits an

employer to terminate an employee-fiduciary for doing her statutory duty and bringing potential violations to the company's attention. Pet. 20-21. At the same time, despite the statute's complexity, ERISA provides *all* plan participants and beneficiaries with an enforcement role by authorizing a private right of action "to enjoin *any* act or practice which violates any provision of this subchapter or the terms of the plan." 29 U.S.C. § 1132(a)(3)(A) (emphasis added). Thus respondents' premise that Congress intended to leave ERISA enforcement to the experts is demonstrably false.

Nor have respondents adequately explained why Congress would have intended to protect workers from retaliation for filing a lawsuit – which gives rise to all the same concerns respondents raise regarding internal complaints, BIO 14-15 – yet permit an employer to fire the same worker for making the same complaint to management instead of to a court.

* * * * *

Petitioner need not "assume she is a better legislator than Congress," BIO 20, to recognize that in choosing among plausible constructions of a statute's text, courts are more likely to implement Congress's true intentions when they chose the interpretation that best advances the statute's objectives and avoids irrational distinctions no legislator would intend. The Third Circuit's decision in this case fails that test while exacerbating an entrenched circuit conflict over the meaning of an important provision of a federal statute affecting the wellbeing of millions of Americans. It should be reviewed by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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IN THE
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SHIRLEY EDWARDS,

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v.

A.H. CORNELL AND SON, INC., ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF *AMICUS CURIAE* OF AARP IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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January 3, 2011

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INTEREST OF *AMICUS CURIAE*[1]

AARP is a non-partisan, non-profit organization dedicated to representing the needs and interests of people age fifty and older. Nearly half of AARP's members are employed full- or part-time, with many working for employers which provide pension and welfare plans covered by the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001-1461. AARP is greatly concerned about retaliatory practices by employers, many of which disproportionately harm older people. AARP thus supports laws and public policies designed to protect employees from such harmful employer practices and to preserve the legal means for them to grieve questionable employer conduct.

The resolution of this case will have a significant impact on the integrity of the administration of all employee benefit plans, including retirement plans, health care plans, etc. The issue in this case will have a direct impact on employees' abilities to participate in benefit programs which will foster their economic security. Participants and beneficiaries in private, employer-sponsored benefit plans rely on ERISA to protect their rights under those plans. In particular, ERISA's protections, and the ability to enforce these

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[1] In accordance with this Court's Rule 37.6, no party's counsel wrote this brief in whole or in part and no person other than *amicus* or its counsel made a monetary contribution intended to fund the preparation or submission of the brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the *amicus curiae's* intention to file this brief. Both parties have consented for *amicus* to file this brief.

protections, are of vital concern to older workers, since the quality of their lives depends heavily on maintenance of their employment and their resulting eligibility to participate in pension and welfare benefits programs. Thus, the protection of employees' rights to stand up for their benefits without fear of retaliation in the form of job termination is of paramount importance.

REASONS FOR GRANTING THE PETITION

Certiorari is warranted in this case to resolve a question of exceptional importance. The decision of the court of appeals poses a serious obstacle to the administration of ERISA in the Third Circuit. The Third Circuit's decision to legalize retaliation against employees who attempt to secure protected rights under ERISA absent the filing of legal proceedings conflicts with the decisions of two other Federal Courts of Appeals that have considered the issue, and conflicts with the teachings of this Court on principles applicable to retaliation claims under other Federal law schemes. The Court has viewed the scope of protection against retaliation for employees who exercise their statutory rights under employment-related statutory schemes as worthy of special attention. National uniformity on this issue is vital if the administration of employee benefit plans is to be conducted with integrity. *Amicus curiae* therefore respectfully requests this Court to review the judgment of the Third Circuit Court of Appeals.

I. THE THIRD CIRCUIT'S INTERPRETATION OF ERISA SECTION 510[2] SUBVERTS CONGRESSIONAL INTENT TO PROTECT ERISA PLAN PARTICIPANTS FROM ADVERSE EMPLOYMENT ACTION ON ACCOUNT OF HAVING SPOKEN UP ABOUT ERISA VIOLATIONS.

A. The Fifth And Ninth Circuits Have Held Section 510 Applicable To Unsolicited Internal Complaints While The Decisions Of The Fourth Circuit And Now The Third Circuit Stand In Stark Conflict To The Holdings Of Those Circuits.

As the Petition for *Certiorari* points out, the Fifth and Ninth Circuits have construed Section 510 to protect unsolicited internal complaints. Petition for Writ of Certiorari at 9-10, *Edwards v. A. H. Cornell & Son, Inc.* (No. 10-732). The Department of Labor agrees with the Petition's analysis of this conflict as well as the Petition's interpretation of the law. *See* DOL C.A. Br. 5-6.

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[2] 29 U.S.C. § 1140. Throughout the brief, the ERISA anti-retaliation statute will be referred to as ERISA Section 510 or simply Section 510.

B. The Third Circuit's Decision Largely Eviscerates Section 510's Protection For Workers Who Informally Bring ERISA Violations To Their Employer's Attention.

As has been recognized by the Secretary of Labor, work place violations are commonly brought to the attention of the employer orally and without formality. In countenancing employer retaliation against employees who follow this common practice, the Third Circuit has crafted a road map for employers in the circuit to practice pre-emptive retaliatory terminations so as to operate below the legal radar and avoid accountability for actions that Congress clearly intended to sanction by Section 510. It cannot be doubted that, because ERISA preemption doctrine precludes recourse under state law for employees who are terminated in retaliation for grievances related to ERISA violations, a savvy employer in the Third Circuit who terminates a complaining employee early in the game gets a free pass with respect to its action.

The critical element to be safeguarded by anti-retaliation statutes is the freedom to stand up and be heard for the rights at issue without fear of economic reprisal, such as adverse consequences on the job. The holding below gives license to employers to visit adverse consequences, here job termination, upon an employee who is determined to exercise rights under ERISA. And the irony should not be lost on the Court that in this case it was the company's human resources director that brought to

the employer's attention claimed ERISA violations; in other words, it was the company employee likely responsible for lawful and proper implementation of ERISA's requirements that bore the brunt of the employer's termination decision on account of her fulfilling her job responsibility. It may be gleaned from the record that the Petitioner's grievances expressed to the employer involved essentially claims that pertained to other employees' rights to ERISA benefits rather than to the complaining employee herself. This fact is not a matter of dispute. Thus, this case in particular points up several problems with the Third Circuit's view of Section 510. For at the end of the day the decision legitimizes employer retaliation against employees who press for enforcement of ERISA's statutorily protected rights.

The Third Circuit's decision on the scope of Section 510's protection not only make for bad law; it also sets the stage for undesirable perverse employment practices in general, inasmuch as the company officer presumably responsible for employer compliance with ERISA's eligibility rules, in order to protect herself, must rat on the company in a formal setting, *i.e.*, federal agency complaint, prior to making every reasonable attempt to advocate for internal compliance aimed at avoidance of agency enforcement action. In short, the circuit court's interpretation strikes at the employee's loyalty to the employer **in the first instance** of the employee's observation of questionable employer practices so as to lessen the opportunity and likelihood of voluntary employer action to correct a

problem with statutory compliance. Surely Congress could not have intended to drive a wedge between the employee and the employer in such a manner.

It is significant that the record reveals no requirement on the part of the respondent for its employees to file written grievances in order to air a complaint with company practices. Arguably, even a narrow reading of the court of appeals decision essentially reads such a minimal requirement into every employer's policies, whether expressed by the employer or not. While it must be granted that the Third Circuit's decision does not stand alone among the circuits, there is ample ground to analyze whether the court below actually intended to fashion such a hard-wired rule. Moreover, it is impossible to reconcile the Third Circuit's holding with the neutral observation that in persisting to press the assertion of ERISA's statutory commands petitioner was performing the obligatory details of the duty she owed to her employer as human resources director.

In view of the Secretary of Labor's assertion that private action and enforcement are critical elements of the administration of ERISA's protective provisions, it is apparent that Petitioner raises a serious argument that Congress's intentions in granting protection through Section 510 to complaining employees are frustrated by the Third Circuit's decision. *See* DOL C.A. Br. 21-22. The Court should grant the Petition and facilitate clarification of the law with respect to the scope of ERISA's anti-retaliation provision.

C. Unlike Certain Statutes Requiring Written Complaints to Vindicate Statutorily Protected Rights, ERISA Section 510 Does Not.

Congress has in many statutes required complaints to be formal in order to be recognized. *See, e.g.*, 2 U.S.C. § 437 g(a)(1) (Federal Election Campaign Act); 5 U.S.C. §§ 3330a(a)(1)(A) & (a)(2)(B) (Veterans Employment Opportunities Act); 7 U.S.C. § 193(a) (Packers and Stockyards Act); 19 U.S.C. § 2561(a) (Trade Agreements Act); 38 U.S.C. §§ 4322(a) & (b) (Uniformed Services Employment and Reemployment Act); 42 U.S.C. § 2000(a) (Civil Rights Act of 1964); 42 U.S.C. §§ 3610(a)(1)(A)(i) & (ii) (Fair Housing Act); 42 U.S.C. § 15512(a)(2)(C) (Help America Vote Act); 47 U.S.C. § 554(g) (Cable Communications Policy Act); 49 U.S.C. § 46101(a)(1) (Federal Aviation Act). It is common practice for Congress to require explicit formalities in connection with the statement of a grievance in order to invoke federal statutory protection, particularly in the employment setting. In so doing, however, Congress has left little doubt as to the elements that are required.

Structurally, Section 510 far more closely resembles the statutory schemes that the Court has held to require the grievant simply to communicate to the employer or other authorized recipient the substance of the complaint. Not even the statutory basis of the complaint is required to be articulated if the substance sufficiently invokes statutory protection. *NLRB v. Scrivener*, 405 U.S. 117, 121,

123-124 (1972); *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960).

It is essential to a clear understanding in the lower courts as to the application of anti-retaliation statutes in general and ERISA Section 510 in particular that the Court offer practical guidance by reconciling the conflict among the Circuits that is evident on the remedial scope of Section 510.

CONCLUSION

For all of the foregoing reasons, the Court should grant the Petition for Certiorari.

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